Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

VERONICA WALLACE,
Petitioner

v.

THE METHODIST HOSPITAL SYSTEM,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED

1. Is there any exception to the Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) that courts must refrain from usurping the role of the jury by reviewing the evidence on JMOL through theories such as "stray remarks" ?

2. Does a court's reliance on its own interpretation of the defendant's justification for the adverse action amount to a weight and credibility assessment by the court, which is prohibited by *Reeves* ?

3. Does a court's requirement that a plaintiff present identical comparative evidence in order to rebut the defendant's justification for the adverse action violate the court's holding in *Reeves* ?

4. Are there any exceptions, beyond those outlined in *Reeves*, that a court must not consider evidence by the movant for JMOL which is rebutted or which the jury is not required to believe?

II.

PARTIES TO THE PROCEEDINGS

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Respondent: The Methodist Hospital System

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III.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Veronica Wallace respectfully requests this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 271 F.3d 212 (5th Cir. 2001), and is reproduced in Appendix A. The opinion denying rehearing en banc is unreported and is reproduced in Appendix B. The decision of the United States District Court, upon which appeal was taken to the Fifth Circuit, is reported at 85 F.Supp.2d 699 (S.D. Tex. Feb. 25, 2000), and is reproduced in Appendix C. The District Court's Final Judgment is Appendix D.

JURISDICTION

The opinion of the United States Court of Appeals was entered on November 7, 2001. Petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied by order entered December 13, 2001. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964: 42 U.S.C. 2000e-2 (a) (1). Unlawful employment practices

(a) It shall be an unlawful employment practice for an employer,

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex....

The Pregnancy Discrimination Act: 42 U.S.C. § 2000e(k).

The terms "because of sex" or "on the basis of sex" include but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work....

STATEMENT OF THE CASE

Statement of the Proceedings:

This is a Title VII pregnancy discrimination case. The case was originally tried to a jury of twelve in September 1998, which trial ended in a hung jury. The case was retried, again to a

jury of twelve, in December 1998, and a unanimous verdict was reached in favor of Ms. Wallace.

At the close of plaintiff's evidence in the second trial, and again at the close of all of the evidence, the defendant moved for judgment as a matter of law, both of which were denied by the district court. The Methodist Hospital System (Methodist) filed a renewed judgment as a matter of law on January 8, 1999. On February 25, 2000, the trial court entered judgment in favor of defendant, reversing the jury verdict on the grounds of insufficient evidence to support a jury verdict.

The Fifth Circuit Court of Appeals found that Wallace had made a *prima facie* case of pregnancy discrimination, and that she had produced substantial evidence of pretext to rebut Methodist's explanation that Wallace's termination was based upon her placement of a feeding tube in a patient without a doctor's order, but then found that Wallace failed to produce substantial evidence of pretext to rebut the argument that she had falsified the patient's record. The Appeals court also distinguished the comments of Donna Hahus and Tory Schmitz as "stray remarks" based on the court's own interpretation of these statements, finding that the comments were not probative evidence of discriminatory intent. Wallace's timely Suggestion for Rehearing En Banc was denied.

Statement of the Facts:

The plaintiff, Veronica Wallace, began working at The Methodist Hospital System on March 24, 1986. R 122/184,ll.17-18. While employed at Methodist, Wallace began a nursing program and became interested in working with critical care patients. R.122/192, ll. 9-11. In September of 1991, Donna Hahus, Head Nurse of MICU (Medical Intensive Care Unit), hired Wallace as a student nurse. R.122/192, ll. 5-8. At the completion of Wallace's student training and critical care residency in November 1992, Hahus hired Wallace as a full-time MICU staff nurse. R.122/204, ll. 21-22.

In the fall of 1992, Wallace married, and then had three consecutive pregnancies while working in MICU. R.122/182, ll. 8-16. Upon return from her first maternity leave in MICU, Wallace noted a difference in the treatment that she received from Hahus (R.122/221, *ll.* 2-16), and on one occasion, Hahus called Wallace "stupid" for following a physician's order on a certain procedure. R.122/249, *ll.* 6-25; 250, *ll.* 1-25. During Wallace's second review, at which time she was about to take her second maternity leave, Hahus told Wallace that she needed to "choose between her family and her career." R.122/227, ll. 15-25. Wallace was also told in this meeting by the Nursing Supervisor, Tory Schmitz, that she had trouble categorizing Wallace on her reviews because of her consecutive maternity leaves. R. 122/272, ll. 10-21. Not long after this review, Wallace became pregnant for the third time, after which Hahus informed Wallace that her pregnancies were costing the hospital too much money and creating scheduling problems in MICU. R. 122/247-ll. 2-13.

In December 1994, Hahus terminated Wallace for alleged unprofessional conduct. R. 122/284, ll. 1-4. Wallace had inserted a feeding tube in a patient, in response to a physician's written order to start tube feeding, but without a physician's direct order to replace the Salem sump with a small bore feeding tube. R. 122/273, ll. 6-19. In doing so, Wallace followed the nursing procedure and practice in Methodist MICU. R. 122/272, ll. 10-21. Hahus encouraged her nurses to think beyond the orders given by doctors, and allowed her nurses to perform procedures that would otherwise require a doctor's direct order as a convenience to the doctors. R. 124/613, ll. 12-21; 621, ll. 16-19. After Ms. Wallace was fired, Nursing Supervisor Schmitz, told another employee that Ms. Wallace was fired because "first of all, she has been pregnant three times in three years." R. 124/671, ll. 10-13. No harm came to the patient due to Wallace's action. R.122/274, l. 24- 275, l. 2; R.125/787, ll. 13-25; 788, l. 1. The Nursing Board of Examiners took no action against Ms. Wallace in response to Ms. Hahus' report of the incident and termination. R. 122/205, ll. 1-11. Non-pregnant MICU nurses committed similar acts, but were not terminated. R. 122/292-298. In one such instance, nurse Cheryl Gray received a verbal order to administer a patient Tylenol by

mouth. Upon returning to the patient, Gray determined that the patient could not receive the medicine without insertion of a naso-gastric tube. Without obtaining an order to do so, Gray inserted the tube and administered the medicine. Gray was spoken to by Schmitz and Hahus about this incident, but was not disciplined in any way. R. 124/523, l. 25; 524, ll. 1-25; 525, ll. 1-22.

REASONS FOR GRANTING THE WRIT

A. THE FIFTH CIRCUIT REFUSES TO FOLLOW *REEVES V. SANDERSON PLUMBING.*

In the recent decision of *Reeves v. Sanderson Plumbing, Inc.*, the Supreme Court admonished the Fifth Circuit for disregarding relevant evidence that was critical to the plaintiff's case. *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 152 (2000). In *Reeves*, the Fifth Circuit had disregarded age-related comments by the plaintiff's superior because they were not made within the confines of the adverse action. *Id.*, citing *Reeves v. Sanderson Plumbing Inc.*, 197 F.3d 688, 693-694 (5th Cir. 1999). The appellate court had also relied on the absence of the fact that any other "decision maker" was motivated by age, and that two managers under the age of forty were also cited, though not terminated, for poor record keeping. *Id.* The appellate court had also acknowledged the overall number of managers throughout the employer's company who were over the age of forty. *Id.* The Supreme Court, however, held that the distinctions made by the appellate court were improper, finding that "the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's." *Id.* at 153.

The opinion in the instant case shows that the admonishment in *Reeves v. Sanderson Plumbing* has failed to impress the Fifth Circuit. It has continued to act as a super-jury over the facts and to implement improper evidentiary burdens that impede employment plaintiffs from succeeding.

The use of the stray remarks theory in *Rubenstein v. Adminstrators of the Tulane Educational Fund*, just after the

Reeves opinion was released, raises serious doubt as to whether the Fifth Circuit will adhere to the High Court's ruling. *Rubenstein v. Administrators of the Tulane Educational Fund*, 218 F.3d 392 (5th Cir. 2000). In reviewing the grant of summary judgment upon one of Rubenstein's claims, the appellate court found that the plaintiff's "evidence to rebut the non-discriminatory reasons offered by Tulane is not so persuasive as to support an inference that the real reason was discrimination." *Rubenstein*, 218 F.3d at 400. In reaching this conclusion, the court discounted the evidence of race-based comments made by members of the salary and promotion committees, stating that "[t]hese comments, standing alone, will not defeat summary judgment on Rubenstein's claims of discrimination in the promotion and pay-raise decisions," and then launched into an application of the stray remarks theory. *Id.* at 401. *See also Auguster v. Vermilion Parish School Board*, 249 F.3d 400, 405 (5th Cir. 2001) (The Fifth Circuit discounted under the theory of stray remarks the direct evidence of race-based statements made by Principal Dartez that he had had trouble with black teachers in the past, and would not hesitate to fire plaintiff); *Crawford v. Formose Plastics Corp.*, 234 F.3d 899, 903 (5th Cir. 2000) (Plaintiff's pretext evidence that the reason that two employees left the department was because of the manager, and not the Plaintiff, was disregarded because the court reasoned that, "[i]t would not have been unreasonable for the company to seek a fresh start in the troubled department."); *Okoye v. Univ. of Texas Houston Health Science Ctr.*, 2001 WL 266305 (5th Cir. April 3, 2001) (A nurse's evidence that physician-employees with performance problems were not barred from the jail and terminated did not support plaintiff's discrimination claim because the situation of each of these physicians was not "nearly identical" to her situation.); *Vadie v. Miss. State Univ.*, 218 F.3d 364 (5th Cir. 2000) (Evidence that the faculty who purportedly made the selection decision for the position in question was ethnically diverse supported the employer's non-discriminatory reason); and *Mato v. Baldauf et al.*, 267 F.3d 444 (5th Cir. 2001) (Plaintiff's evidence that two adminstrators who held animus toward her for helping other women file discrimination complaints were greatly involved in the "reorganization" that resulted in her termination, including that they "massaged" the job description for her position,

was disregarded because defendant's interested witnesses testified that Fox, a "new" administrator, made the decision to add the Ph.D. requirement to the position held by plaintiff.)

Absent immediate determination by this Court, employment plaintiffs in the Fifth Circuit will continue to suffer the effects of heightened evidentiary burdens and the imposition of the Fifth Circuit's weight and credibility determinations, precluding employment plaintiffs from participating in a fair, just legal system.

B. THE PANEL IGNORED *REEVES'* INSTRUCTIONS AND ACTED AS A SUPERJURY OVER WALLACE'S EVIDENCE OF PRETEXT

1. The Fifth Circuit Discounted Animus-based Statements as "Stray Remarks"

The court treated as stray remarks the following statements by Head Nurse Donna Hahus and Nursing Supervisor Tory Schmitz:

- That Ms. Wallace, upon returning from maternity leave, was "stupid" for following a physician's order. Doc. 122, p. 249, *ll.* 6-25; p. 250, *ll.* 1-25.
- That Wallace needed to "choose between her family and her career." Doc. 122, p. 227, ll. 15-25; P's Ex. 1.
- That they had trouble categorizing Ms. Wallace on her reviews because of her consecutive maternity leaves. Doc. 122, p. 272, ll. 10-21.
- That Wallace's pregnancies were costing the hospital too much money and creating scheduling problems in MICU. Doc. 122, p. 247-ll. 2-13.
- That Wallace was fired because, "she's been pregnant three times in three years." Doc. 124, p. 671, ll. 10-13.

The court considered these statements separately from the rest of Wallace's evidence of pretext, stating that,

> "In light of Wallace's failure to rebut each of the reasons Methodist proffered, the comments of Schmitz and Hahus must satisfy the test we laid out in *Brown v. CSC Login, Inc.*, 82 F.3d 651 (5th Cir. 1996), in order to constitute sufficient evidence of discrimination. *See Rubenstein*, 218 F.3d at 400-01; *Auguster*, 249 F.3d at 405 (concluding that while we had questioned the vitality of stray remarks doctrine post-*Reeves*, the doctrine remained intact "at least where the plaintiff has failed to produce substantial evidence of pretext").

Appendix (App.) A at 13.

As fully addressed below, Wallace did produce substantial evidence of pretext to rebut Methodist's reason for her termination, and the court's finding to the contrary is based on improper weight and credibility assessments.

The court's use of the stray remarks theory is in direct contradiction of this Court's instruction in *Reeves*. The stray remarks doctrine is the same vehicle that the Fifth Circuit used in *Reeves* to disregard statements of Reeves' supervisors and which invoked criticism from this Court. *Reeves*, 530 U.S. at 152, citing *Reeves v. Sanderson Plumbing Inc.*, 197 F.3d 688, 693-694 (5th Cir. 1999). Despite the Fifth Circuit's attempt to explain it's application of the stray-remarks theory post-*Reeves*, nowhere in *Reeves* is there justification for a court to step into the role of the jury by interpreting evidence in the light of "stray remarks" upon ruling on judgment as a matter of law.

Upon proper review, the statements by Hahus and Schmitz constitute direct animus-based comments on Wallace's pregnancy and cannot be discounted as "stray remarks." *Reeves* made clear that these are precisely the kind of remarks that a jury might find to evidence animus. *Reeves*, 530 U.S. at 153. The statements above were directly related to Wallace's pregnancies, and were made while she was pregnant. Their content indicates pregnancy animus and the speakers were primarily responsible for Wallace's

termination. *Reeves*, 530 U.S. at 152-153. In fact, the comments that Hahus and Schmitz made are even stronger evidence of animus than the age-related comments in *Reeves*. While Reeves suffered the indignities of being called, "too damn old" and was asked if he had come over on the Mayflower (*Reeves*, 530 U.S. at 151), Veronica Wallace was warned in no uncertain terms during her pregnancies that she needed to choose between nursing and family, that her maternity leaves may affect her evaluations, and that she was costing the hospital money. The final admission by Schmitz, that Ms. Wallace was fired for being pregnant three times, was properly found by the jury to be the true reason for Ms. Wallace's termination.

Nevertheless, the panel inferred from these statements that there was no discrimination, usurping the role of the jury and ignoring the teachings of *Reeves*. Although Hahus was a person with authority over the employment decision, the panel concluded that her most damning statement "does not relate specifically to an employment decision of any kind as did the statement in *Deffenbaugh-Williams*." App. A at 16. In *Deffenbaugh-Williams*, the supervisor said to the plaintiff that she would "never move up with the company being associated with a black man." *Deffenbaugh-Williams v. Wal-mart Stores, Inc.*, 156 F.3d 581, 584 (5th Cir. 1998) (en banc). Contrary to the court's interpretation of the evidence, it is difficult to conceive of a statement more directly related to an employment decision than where the head nurse tells a nurse in her unit, during her performance appraisal, that she needs to choose between continuing to be employed, or staying at home and raising her children.

With respect to the other two Hahus comments, the jury could reasonably infer discriminatory intent. Wallace was told that she was "stupid" and that she was "costing the hospital money" while she was pregnant, and that she needed to choose between nursing and a family. These statements, which show that Hahus and Schmitz were increasingly critical of Wallace during her pregnancies, is similar to Reeves' age-based evidence that his supervisor treated him like a child. *Reeves*, 530 U.S. at 152.

With regard to Schmitz's statement about not knowing how to "classify" her, the court accepted Schmitz's testimony that she was simply uncertain whether she could count the time for Wallace's maternity leaves as part of her experience. App. A at 13. The court stated that: "[i]t is only if we infer that Schmitz's reference to Wallace's absences is code language for Wallace's pregnancies that it relates to Wallace's protected class." App. A at 14. Despite the court's interpretation of this statement, the jury was entitled to disbelieve Schmitz' explanation for her comment and infer from the evidence that Schmitz's statement was a warning to Wallace that if she did not choose between nursing and family as Hahus demanded, that her evaluations would be affected. *Reeves*, 530 U.S. at 153. Further, Hahus was sitting next to Schmitz in that meeting, and said nothing in response to Schmitz's statement, thus adopting her statement.

Next, the panel dismissed Schmitz's statement that Wallace was fired because she was pregnant three times in three years by finding that Schmitz had not participated in the firing. The court went on to state that Schmitz's statement was "at best, her opinion of why Methodist terminated Wallace." App. A at 15. To the contrary, the evidence before the jury showed that Hahus and Schmitz were Wallace's supervisors, that Schmitz conducted the "investigation" into the incident, and that they both signed the termination form. Just as in *Reeves*, Schmitz was actively involved in and influenced Wallace's termination. *Reeves*, 150 U.S. at 152. As the court itself noted, both Schmitz and Hahus talked to Cheryl Gray after she placed a tube in a patient without a doctor's order, but that "Schmitz and Hahus did not terminate [Gray] for her actions." App. A at 12. Obviously, the court recognized that Schmitz and Hahus were a disciplinary team over the conduct of Cheryl Gray, but refused to acknowledge the same when it came to Wallace.

When viewed in light of *Reeves*, the jury in this case could have disbelieved defendant's justification for Wallace's termination based solely upon the probative value of the animus-based statements made by Hahus and Schmitz. *Reeves*, 530 U.S. at 148-149. Wallace also presented, however, substantial evidence of

pretext in the form of comparative evidence of similar acts and other evidence showing the falsity of Methodist's justification.

2. The Fifth Circuit Re-Invented the Defendant's Justification

In this case, the Fifth Circuit found that Methodist offered two *independent* reasons for terminating Wallace - performing the procedure without a doctor's order, and writing it in the patient's chart - and that Wallace did not rebut the latter. App. A at 12-13. The court's conclusion is not supported by the record and places an extra burden on plaintiff to provide as comparative evidence instances of conduct factually identical to that for which she was allegedly terminated, in violation of the spirit and letter of the opinions of this Court.

The record shows that Wallace was given written notification upon her termination that the reason for her employer's action was that she had committed a "Class I Violation: Unprofessional Conduct detrimental to patient care." D's excerpt 4. The space provided for explaining the violation was entitled, "Relevant Factors (Date, Time, Place, Etc.)" and in this space was typed, "On December 19, 1994, made false entry in medical record. V.W. performed a procedure on a patient without a physician's order then wrote as a verbal order. No verbal order had been given." Methodist's Record Excerpt 4.

At trial, Methodist offered numerous reasons for Wallace's termination. In opening statement Methodist argued that Wallace had exercised "flawed thinking" in carrying out the doctor's order (R. 122/172), willfully falsified the record (*Id.),* and practiced medicine by diagnosing a condition and endangered a patient. (R.122/73-74.) Hahus testified that she recommended the termination based on Methodist policies "G" (willful, unprofessional conduct) and "H" (deliberate omission or falsification of employer records). (EX-5.) She admitted on cross examination, however, that in her prior testimony she stated that she had only considered "G," unprofessional conduct for the termination, and not falsification of records, despite the factual

explanation of the incident on the termination notice. (R.124/526.) Hahus testified that the termination was not about endangerment or potential harm to the patient, and that Wallace did not prescribe or diagnose. (R.124/581;620-621). Despite the admissions of Hahus, Methodist argued again in closing that Wallace' conduct was detrimental to patient care or exploitation of a patient. (R.126/1172.) Such shifting reasons for the adverse action were addressed in *Reeves*, in which the Court states:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

Reeves, 530 U.S. at 147-148, 120 S.Ct. at 2108-2109.

The jury, having heard these shifting reasons for Ms. Wallace's termination, was free to disbelieve all of them.

The Fifth Circuit ignored Methodist's shifting reasons at trial, and instead formulated two independent reasons for Ms. Wallace's termination. To justifiy its interpretation, the Fifth Circuit comments that Methodist did not assert that performing the procedure without a doctor's order and writing a verbal order in the chart constituted a *single* nondiscriminatory reason for Wallace's termination; therefore the court considered them two independent reasons. App. A at 12, FN 14. The Court's re-invention of the defendant's proffered reason for Wallace's termination amounts to a weight and credibility assessment of the evidence, and drawing inferences from the facts that are within the province of the jury to do. *Reeves*, 530 U.S. at 153. The only burden an employer has in burden-shifting cases is to offer its reason or reasons for the adverse action. The burden should be on the employer to specify that there were independent reasons for the adverse action, "especially since the employer is in the best

position to put forth the actual reason for its decision." *Reeves*, 530 U.S. at 147 (internal citations omitted). Otherwise, it is up to the jury to determine whether the defendant's reason - or reasons - is pretext for discrimination.

Wallace was terminated for committing a single act of alleged unprofessional conduct on December 19, 1994. Def.'s Record Excerpt 4. Methodist never presented any evidence that placement of the salem sump and entry of a verbal order in the chart were two separate, independent reasons for the termination of Ms. Wallace. To the contrary, Ms. Hahus admitted at trial that in making the recommendation for termination she had only considered the hospital's policy on unprofessional conduct and not the separate policy for falsification of records. R. 124/526. Even assuming that the Fifth Circuit's interpretation of the defendant's proffered reason is correct, Wallace presented substantial evidence of pretext from which the jury could have disbelieved any of Methodist's reasons for her termination.

3. The Fifth Circuit Required Evidence Of "Identical Acts"

Wallace presented substantial evidence that non-pregnant nurses wrote verbal orders for procedures requiring a doctor's order without actually having an order from the doctor, and that these nurses were not terminated. Donna Hahus testified that she was aware that nurses wrote verbal orders and implemented procedures such as x-rays, flushes, restraints, and altering dosages of medications, all of which require a doctor's order, without first obtaining an order, and that she had never disciplined or terminated anyone for any of these acts. R.124/619, *ll.* 1-25;620, *ll.* 1-5.

Ms. Hahus testified that it was proper for nurses to perform these procedures without a doctor's order as a "convenience" to the doctor, even though she could point to no policy distinguishing which procedures requiring a doctor's order a nurse can or cannot perform independently. R.124/ 613, *ll.* 12-21; 621, *ll.* 16-19. Moreover, with regard to flushes, Ms. Hahus

testified that a doctor's order was not needed for saline flushes. R.124/617, *ll.* 3-5. Upon cross-examination, however, Ms. Hahus was forced to admit that in 1994, when Ms. Wallace was employed by Methodist, heparin flushes were used, that heparin flushes did require a doctor's order, and that nurses were performing heparin flushes without a doctor's order. R.124/652, *ll.* 5-7

Five nurses from Methodist MICU testified that they have written verbal orders and performed procedures without contacting the doctor first. Pat Gaskin testified that she has written a verbal order for and implemented the following procedures without a doctor's direct order: the placement of restraints, administration of Tylenol, lab values, type and cross lab-draw, and x-ray. R.124/662, *ll.* 7- 669, *l.* 25. Indeed, before Ms. Wallace was terminated, Ms. Gaskin replaced a feeding tube with another feeding tube without a doctor's direct order, and after Ms. Wallace's termination Gaskin observed a fellow MICU nurse insert a feeding tube without a doctor's order. R.124, 667, *ll.* 24-25; 668, *ll.* 1-21.

Linda Coscio testified that she had drawn blood without a doctor's order before, even though an order is required (R.126/995, *ll.* 4-11), and Amy Goggans testified that she had written a verbal order for and placed a Foley catheter without a doctor's order prior to Ms. Wallace's termination. R.124/587, *ll.* 14-19.

Martine Rousseau-Mezile testified that while employed in Methodist MICU she wrote a verbal order for and performed the following procedures without a doctor's direct order: x-rays, flushes, maintenance, dressing changes, and restraints. R.83/ 302, *ll.* 17-25; 303, *ll.* 1-8. She further stated that she learned to do this as part of her training in MICU. R.83/300, *l.* 25; 301, *ll.* 1-3.

Cheryl Gray, a former contract employee of Methodist Hospital in MICU, placed a nasogastric tube without an order to place that tube. R.124/524, *l.* 5 – p. 525, *l.* 10. Ms. Gray asked a Fellow on duty whether she could administer a medication to a patient orally, but upon realizing the patient could not receive the medication by mouth, she placed a tube without an order, to

administer the drug. R.124/525, *ll.* 8-10. The attending doctor for the patient complained about Ms. Gray's independent placement of the tube because it was dangerous for this particular patient. R.124/ 524, *ll.* 1-25; 525, *ll.* 1-22. Ms. Gray testified that both Tory Schmitz and Donna Hahus spoke to her about the incident, but she was not disciplined or terminated. R.124/525, *ll.* 13-19.

Ms. Gray also testified that while in MICU she performed an arterial gas, sent a patient to x-ray, and took blood cultures, all without a doctor's direct order. R.124/528, *ll.* 16-25; 529, *ll.* 1-16; 530, *ll.* 3-25. She testified that these were all invasive procedures and all required a doctor's order, and were performed by the nurse as a standard practice, to prevent harm to the patient or to complete procedures that needed to be done. R. 124/528, *ll.* 16-25; 529, *ll.* 1-9.

Tory Schmitz, the MICU Nursing Supervisor, also performed procedures, as evidenced by the nurses' critical care flow sheets, without a doctor's order. Defendant's EX. 3 at M0001128. In fact, after the termination of Ms. Wallace, Ms. Schmitz inserted a French feeding tube into the same patient, without a written doctor's order to do so. R.125/904, *l.* 19 – 125, *l.* 2; R.125/919, *ll.* 13-24. On another occasion, Ms. Pat Gaskin observed Schmitz replace medications on the stock cart in non-emergent situations without a doctor's order. R.124/669, *ll.* 14-21.

The Fifth Circuit found that the Cheryl Gray incident was "almost the exact procedure" that Ms. Wallace performed on her patient without a direct doctor's order, and that this evidence satisfied Wallace's burden of showing pretext for the first reason articulated by Methodist for Wallace's termination. The court found, however, that Ms. Wallace had not shown that the falsification charge was pretextual because it found that "the nurses to whom Wallace points are not similarly situated." App. A at 11-12. The court's failure to consider Plaintiff's evidence of similar conduct because they were not an "almost exact" match or identical to the facts of Ms. Wallace's instance, even though they were just as serious in nature, clearly contradicts Supreme Court precedent.

Although not directly addressed in *Reeves*, the use of a "nearly identical" standard for comparative evidence is the same harsh view of plaintiff's evidence that the Court criticized with regard to the stray remarks theory. *Reeves*, 530 U.S. at 152. This Court has never required identical or exact comparative evidence in showing pretext. In addressing selective discipline cases, this Court has stated:

> Of course, precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation that "other employees involved in acts against (the employer) of comparable seriousness ... were nevertheless retained..." is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext.

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11, 96 S.Ct. 2574, 2580-81, 2586 n.11 (1976), quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 596 (1973). Nor does it matter whether Wallace "admitted" to performing a procedure without a doctor's direct order. The court refused to consider plaintiff's pretext evidence showing that Methodist failed to investigate her claim that others committed similar acts and were not terminated because of "Wallace's repeated admissions to the acts that were the basis for her termination." App. A at 17-18. Ms. Wallace never admitted to committing willful unprofessional conduct. Wallace testified that she did not willfully "falsify" a patient's record - she was following the policy and procedure practiced in Methodist's MICU and she truthfully recorded the actions she had taken in the patient's record. R.122/270-275; 289; 123/462. Regardless, this Court has rejected arguments by employers that a plaintiff's admission of a serious misconduct or crime against the employer barred the plaintiff's discrimination claims. Rather, in *McDonald v. Santa Fe Trail Transportation Company*, this Court held that:

> The Act prohibits All racial discrimination in employment, without exception for any group of particular employees, and while crime or other misconduct may be a legitimate basis for discharge, it is hardly one for racial discrimination.

McDonald, 427 U.S. at 283-4. The *McDonald* court illustrates this point by discussing the successful plaintiff in *McDonnell Douglas*, who had been allegedly terminated for a nontrivial offense against his former employer. *Id.*, citing *McDonnell Douglas*, 411 U.S. at 803. While different offenses may present a more compelling reason for discharge than others, "this does not diminish the illogic in retaining guilty employees of one [protected class] while discharging those of another.... *Id.* Like the plaintiffs in *McDonald* and *McDonnell Douglas*, Wallace presented evidence that nurses in her unit committed acts of comparable seriousness, and were not terminated.

According to Methodist's policies, the failure of a nurse to receive a doctor's direct order for those procedures requiring an order is professional misconduct. Admittedly, Hahus allowed and encouraged her nurses to break this rule on a routine basis, but selectively fired the pregnant Wallace when she did so. The record evidence discussed above shows that six nurses had performed invasive procedures without a doctor's order and then either got the doctor's approval after the fact or wrote the order in the chart for the doctor to sign on later rounds. Based on Methodist's policies, once the nurse implemented a procedure without a doctor's direct order, anything that appeared in the patient's record thereafter amounted to a falsification. For example, the fact that Ms. Gray did not note in the patient's record that she had placed the salem sump without a doctor's order to do so was an omission that amounted to falsification of the record.

Further, "comparative evidence" is not the only evidence that a plaintiff can present to show pretext. In *Reeves*, the plaintiff did not point out a fellow employee accused of each of the reasons asserted by his employer for termination. Reeves showed that the

allegation of poor time record keeping and falsification of time records was pretextual because the time clock often malfunctioned and he wrote in the times for employees who had arrived on time when that happened. *Reeves*, 150 U.S. at 144. Reeves showed that the allegation that he failed to discipline employees, which could cause problems with the Union, was pretextual because he was not responsible for employee discipline, and no union grievance had been filed as a result of his actions. *Id.* Reeves rebutted the evidence that he allowed unnecessary overtime on his line by showing that he assigned extra work to people who arrived early or worked late, so that their work time was justified, and that the company had never actually calculated overtime payments allegedly attributable to his acts. *Id.*

Likewise, Wallace showed that Hahus had a policy of allowing her nurses to implement procedures without a doctor's order; that it was also the policy in MICU for nurses who performed a procedure without a doctor's direct order to write the procedure in the chart for a doctor to sign later; and that Hahus admitted that she did not consider the hospital's policies on falsification in making her decision to terminate Wallace, but instead based the termination on unprofessional conduct. Wallace testified that she did not willfully "falsify" a patient's record. R. 122/270-275; 289; 123/462. The jury also heard evidence that no harm came to the patient, and that the Nursing Board of Examiners took no action against Ms. Wallace in response to Ms. Hahus' report of the incident and termination. Based on a proper review of the evidence in the light most favorable to Wallace the Fifth Circuit should have upheld the verdict of twelve jurors in favor of Ms. Wallace.

C. THE PANEL IGNORED *REEVES'* INSTRUCTIONS THAT IT MAY NOT CONSIDER EVIDENCE BY THE MOVANT WHICH IS REBUTTED OR NOT REQUIRED TO BE BELIEVED BY THE JURY

In reviewing the record, the appellate court was required to disregard all evidence favorable to Methodist that a jury is not required to believe and all evidence from interested witnesses that

has been contradicted or impeached. *Reeves*, 530 U.S. at 151. Ignoring *Reeves*, the panel accepted Hahus and Schmitz' explanations for their statements about Wallace's pregnancies, despite the fact that both are interested witnesses for Methodist, and considered evidence proffered by Methodist even though controverted. App. A at 15-16. *See Reeves*, 530 U.S. at 151.

The court improperly considered defendant's evidence that Schmitz's comment about not being able to classify Wallace was based on whether she should count the time during Wallace's maternity leaves for the purpose of calculating experience. App. A at 13-14. The court also wrongly considered defendant's evidence that Hahus called Wallace "stupid" because she drew a blood sample knowing that it would have a false high, and not because of pregnancy animus. App. A at 15. The court improperly accepted Hahus' explanation that her statement that Wallace was costing the hospital money merely reflected her opinion of the compressed time schedule in general. App. A at 15-16. The court also erred in accepting the justification that Hahus' comment about choosing between work and family reflected a stereotype, not of pregnancy animus, but of working mothers (which is nonetheless discriminatory). App. A at 16. None of these excuses, derived from the testimony of Defendant's most interested witnesses, Schmitz and Hahus, should have been considered by the court.

The court also improperly considered defendant's evidence that Paula Hansen, Hahus' immediate supervisor and clearly an interested witness, was unaware of Wallace's pregnancy (App. A at 5), despite evidence that Wallace was still pregnant at the time of the internal appeal, and despite Hansen's refusal to investigate similar conduct in MICU (upon Wallace's response that it was the practice in MICU and that others were not terminated) because she "had no reason to go there." R.126/1085-6.

The court improperly relied on defendant's evidence that some of the similar acts by other nurses did not require a doctor's order or that no one in supervisory capacity was aware of these violations. App. A at 11-13. These excuses for defendant's failure to terminate these nurses was proffered through the testimony of

Hahus, who admitted that she allowed nurses to do some procedures without a doctor's order as a convenience to the doctor, and her contradictory testimony denying knowledge of these acts. Hahus is an interested witness for Defendant, whose testimony in favor of Defendant should not have been considered by the court.

Further, these excuses were contradicted by plaintiff's evidence. Five non-supervisory MICU nurses testified that the procedures they performed without a doctor's order all required an order by Methodist's policies, and that they were following the practice of MICU in doing so. In addition, Hahus admitted that some procedures, including heparin flushes, were being administered without a doctor's order, and that there were no written policies or procedures to show which could or could not be performed without a doctor's direct order in MICU. Further, the jury could have, and obviously did, disbelieve Hahus' testimony that she was unaware of these incidents, especially since Plaintiff presented evidence that it was a common practice in MICU, encouraged by Hahus.

The court also improperly relied on defendant's evidence that Methodist terminated another nurse for falsifying a medical record. App. A at 12-13. Hahus claimed that in the past she had terminated some unidentified nurse for falsification of a record. In that situation, the nurse had accidentally broken a blood bag ordered for a patient. R. 124/608, *ll.* 2-25. The nurse threw the bag in the trash, and then made a false entry on the patient's chart indicating that the blood had, in fact, been given. R. 124, 608, *ll.* 2-19. The falsification was discovered only because the patient complained that he had not received a full unit of blood. R.124/608, *ll.* 2-25. Hahus investigated the incident herself and found the wasted unit of blood. R.124/ 608, *ll.* 20-22. While possibly probative evidence for the jury to consider, this evidence should not have been considered by the court because it was based solely on the testimony of Hahus, an interested witness on the behalf of Methodist.

Further, this incident was contradicted by the numerous instances discussed above in which a nurse conducted a procedure

without a doctor's direct order and falsified the patient's record but was not terminated.

Finally, the court ignored Wallace's evidence that Hahus could have considered lesser punishment than termination under Methodists' policies, but refused to do so. R.126/1067, ll. 10-13; 1076, ll. 12-14. All of this amounts to improper reliance on evidence that the jury was not required to believe, in violation of *Reeves*.

CONCLUSION

Employment plaintiffs face an uphill battle in pursuing their rights. *Reeves v. Sanderson* gave these litigants some hope that the heightened standards being placed upon their cases, in direct contravention with the precedent of this Court, would be curtailed. The instant case shows that the Fifth Circuit, having been admonished in *Reeves*, still refuses to follow the spirit and letter of *McDonnell Douglas* and its progeny. Justice requires that the Fifth Circuit opinion below be reversed, so that the message may be clear that employment plaintiffs are entitled to fairness in the work place and in the courts, and that super-juries in the cloak of federal judges will not be tolerated.

For these reasons, petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above instrument has been served by placing it in the United States Mail, postage paid, on this the 5th day of March, 2002, addressed to:

Juliann Panagos
Lucille Anderson
McGlinchey Stafford
1001 McKinney, Suite 1500
Houston, TX 77002

BEATRICE MLADENKA-FOWLER

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 00-20255

VERONICA A. WALLACE,
Plaintiff – Appellant,

versus

THE METHODIST HOSPITAL SYSTEM,
Defendant – Appellee

Appeal from the United States District Court
For the Southern District of Texas

November 7, 2001

Before EMILIO M. GARZA and PARKER, Circuit Judges, and HINOJOSA*, District Judge. EMILIO M. GARZA, Circuit Judge:

Veronica A. Wallace ("Wallace") appeals the district court's grant of judgement as a matter of law to the defendant, The

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* District Judge of the Southern District of Texas, sitting by designation.

Methodist Hospital System ("Methodist"), on her Title VII[1] and Texas Commission on Human Rights Act (TCHRA)[2] claims of sex discrimination. We affirm.

I

Wallace began working at Methodist in 1986 as a technician, but in 1990, she entered nursing school.[3] While she was in nursing school, Donna Hahus (" Hahus"), the head nurse of Methodist's Medical Intensive Care Unit (MICU), hired Wallace as a student nurse. In the fall of 1992, soon after Wallace completed her nursing degree and became a Registered Nurse, Hahus hired Wallace as a staff nurse in the MICU. At the time she was hired, Wallace was pregnant with her first child. During the spring of 1993, Wallace took three-and-a-half months' maternity leave. By using accrued sick time, holiday time, and vacation time, Wallace received full pay and benefits throughout this leave.

Wallace returned to work in June. Shortly after returning to work, Wallace discovered that she was pregnant with her second child. Wallace switched her schedule from days to nights and began working a compressed schedule, putting in three twelve-hour shifts each week instead of five eight-hour shifts. Wallace testified that on her return, Hahus treated her differemtly. Specifically, when Hahus came on her shift and Wallace was finishing her shift. Hahus did not converse with Wallace when she entered a room to check a patient's chart. However, Martine Rousseau-Mezille, a nurse who was not pregnant during her employ in the MICU, testified that this was how Hahus treated her, i.e., she would just go about her business looking at the charts without speaking.

Just before Wallace left on her second maternity leave, Hahus and Tory Schmitz ("Schmitz"), Wallace's direct supervisor, met with Wallace to give her an evaluation. Wallace received a satisfactory rating and a merit increase as a result of this appraisal.

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1 42 U.S.C. § 2000e *et seq.*

2 Tex. Labor Code Ann. § 21.051 *et seq.*

3 Our recitation of the facts reflects the lens through which we view the evidence on a motion for a judgment as a matter of law, namely, in the light most favorable to the nonmovant. *See* Section II.A. *infra.*

Nonetheless, the evaluation contained written comments criticizing Wallace for "an impression that she is unconcerned with errors and omissions" and her overall score dropped ten points from the previous year when she was also pregnant. The evaluation noted that Wallace had been working the compressed scheduled since returning from maternity leave. During this meeting, Hahus remarked to Wallace that she needed to "choose between nursing and family." Additionally, Schmitz told Wallace that she was unsure "how to classify [Wallace] because [she was] gone three months before and [she would be] gone three months again."

From March 2, 1994 through June 4, 1994, Wallace took her second maternity leave. Unlike her first maternity leave, Wallace had little accumulated time on which to draw, leaving a portion of her leave unpaid. With Hahus's assistance, however, Wallace increased the paid portion of her leave. Hahus listed enough days of Wallace's leave as excused absences to allow Wallace to accrue an additional four weeks of paid vacation time, which Wallace applied to her leave.

Within a month of returning to work after her second leave, Wallace learned that she was pregnant with her third child. Wallace testified that Hahus mentioned the availability of the compressed schedule to a group of nurses. Wallace stated her preference for this schedule. Hahus retorted that Wallace was "still costing the hospital money because [she] was receiving full benefits and giving 80 hour pay periods." Hahus, however, had no control over whether nurses worked a compressed schedule because it was part of a program Methodist offered to its employees. Wallace resumed working a compressed schedule.

Sometime prior to when she was slated to take her third maternity leave, Hahus chastised Wallace for following a physician's order literally, exclaiming "How stupid could you be?" A physician had issued an order to draw blood to ascertain the digoxin level of a patient to whom Wallace had just administered digoxin. Wallace knew that drawing the blood so close in time to the drug's administration would result in a false high and so she attempted to locate the physician giving the order. Learning that he had already left for the day. Wallace drew the blood. Hahus received the test results, which she realized registered a false high because of the close proximity of the draw and the administration.

On December 19, 1994, Dr. Barrosa, a gastroenterologist, issued a written order for tube feeding to begin on Mr. B.,[4] a patient in the MICU.[5] Under the order of Mr. B's attending physician, Dr. Kenneth Lloyd, Mr. B already had in place a Salem Sump, a large bore tube used for suctioning fluids from the stomach but which could also be used for tube feeding. Wallace knew that the Salem Sump could be used for feeding. Without an order to do so, even though one was required,[6] Wallace replaced the Salem Sump with a feeding tube of a smaller diameter. She also wrote in the patient's record that she had received a verbal order from Dr. Nicola Hanania to put in the smaller bore tube.[7] Dr.

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[4] The patient has been referred to throughout these proceedings as "Mr. B."

[5] Dr. Barrosa's order stated:

12-19-94 11:00 a.m.

1) Start TF [tube feeding] with FS [full strength] VivinexTen @ 30 millimeters per hour
2) Check gastric residuals q4h [every 4 hours] – hold TF [tube feeding] X 2H [for 2 hours] if greater than 200 millimeters.
3) Keep bed in reverse Trendelenburg [keep the head up higher than the feet].
4) Okay to transfer to floor from GI standpoint.

[6] Methodist Policy D-707 provides:

A physician order is required for insertion or removal of a nasogastric tube.

[7] Wallace wrote:

12-19-94 Place feeding tube & check with X-ray. 4p[4:00p.m.]

VO [verbal order] Dr. Hanania/Veronica Wallace

Lloyd discovered that the Salem Sump had been replaced. He did not want the Salem Sump removed because of Mr. B's medical problems. After checking the chart and seeing the order with Dr. Hanania's name affixed, Dr. Lloyd asked Dr. Hanania why he had ordered the tube change. Dr. Hanania informed Dr. Lloyd that he had given no such order. Dr. Lloyd then spoke with Wallace. At trial, Wallace admitted that she could have but did not contact a physician about Dr. Barrosa's order.

The next day, Dr. Lloyd told Schmitz about the incident. Schmitz spoke to both Dr. Hanania and Dr. Barrosa, verifying that neither had given an order to change the tube. Dr. Barrosa testified that he did not want the Salem Sump changed. At the direction of Hahus, Schmitz called Wallace at home to inquire about the incident. Wallace admitted to Schmitz that she had inserted the tube without an order and had written that she had received a verbal order without having received one. Additionally, Wallace stated to Schmitz that she "wouldn't do it again." Schmitz related to Hahus what Wallace told her. Hahus verified with Dr. Hanania that he had not given the verbal order as Wallace had written. Hahus also discussed the incident with Marcella Louis, a nursing director and chairman of the peer review committee, Paula Hansen ("Hansen"), another nursing director and Hahus's supervisor, and Dr. Davies, the medical director of Methodist. Hansen, who was not aware that Wallace was pregnant, agreed that termination was the appropriate course of action. Hansen then contacted Leslie Wagner ("Wagner") in the Human Resource department. Hansen informed Wagner of the incident, and of Hansen's and Hahus's recommended course of action. Wagner agreed with the decision to terminate Wallace.

On December 21, 1994, Hahus called Wallace and asked her to report to Hahus's office. At that meeting, Hahus informed Wallace that she was terminating her for falsifying a hospital record by writing a verbal order for a specific procedure and then implementing that procedure without a physician's knowledge or consent. Hahus furthered explained that these actions were "willful or illegal, unprofessional conduct or unethical conduct detrimental to patient care or to [Methodist]'s operations that result

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A verbal order is simply an order given verbally. Pursuant to Methodist Policy D-203, nurses are permitted to transcribe a physician's order.

in neglect, abuse, or exploitation of any patient,"[8] which constituted a "Class I Violation."[9] At the time of her discharge, Wallace was one month away from taking her third maternity leave.

Wallace requested an informal grievance meeting as provided by Methodist policy. Wagner, Hahus, Hansen, and

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[8] Methodist policy provides that Class I Violations include:

> G. Willful or illegal, unprofessional conduct or unethical conduct detrimental to patient care or to [Methodist]'s operations that result in neglect, abuse, or exploitation of any patient.
>
> H. Deliberate omission of information, falsification of employee/employer records, or falsifying information to management regarding their availability for work, job duties, or performance.

[9] Methodist Due Process Policy P001 provides:

> A CLASS I Violation is defined as a serious violation of System standards under circumstances that, after a thorough consideration of the facts, may justify termination for a first violation without regard to the employee's length of service or prior record of conduct.
>
> Recommended action to be taken is termination for the first violation after review by Employee Relations. See III.H.2.

Section III.H.2 of Policy P001 provides:

> Immediate termination. If termination is elected due to the clarity of the issues involved and the severity of the violation, the manager/supervisor must review the facts with Employee Relations before terminating the employee and no later than a workday following a weekend termination to ensure that the action was equitable and consistent with similar cases.

Schmitz were present at that meeting. Wallace again admitted that, without receiving a doctor's order, she wrote a verbal order in Mr. B's chart and she replaced the Salem Sump, inserting a smaller bore nasogastric tube. Wallace also admitted that there were physicians available from whom she could have obtained an order prior to writing the order and inserting the feeding tube. In her defense, Wallace contended generally that other nurses engaged in the same actions, but were not terminated. The termination was upheld.

Shortly after Wallace's termination, Pat Gaskin ("Gaskin"), another nurse in the MICU, overheard Shawn Forney, a clinical dietician in the MICU, ask Schmitz why Wallace had been terminated. Schmitz replied, "First of all, she's been pregnant three times in the last three years." Upon hearing Schmitz's reply, Gaskin walked away.

Wallace filed suit against Methodist, alleging that Wallace had been terminated because of her sex, i.e., her pregnancies, in violation of Title VII and the TCHR. In September of 1998, the case went to trial. The jury was unable to reach a verdict and the district court declared a mistrial. The district court held a second trial in December of 1998. At the close of Wallace's case and at the close of all the evidence, Methodist moved for a judgment as a matter of law (JMOL), pursuant to Federal Rule of Civil Procedure 50. Both times the district court denied the motions. The jury returned a verdict for Wallace, awarding her $70,000 in compensatory damages and $437,500 in punitive damages. Methodist again moved for a JMOL. The district court granted the motion and dismissed the case with prejudice. Wallace filed a timely appeal.

II

A

We review the district court's grant of JMOL de novo. *See Ins. Co. of N. Am. V. Aberdeen Ins. Servs.*, 253 F.3d 878, 883 (5th Cir. 2001). JMOL is appropriate when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a). There is no legally sufficient evidentiary basis when "'the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that

reasonable men could not arrive at a contrary verdict.'" *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 401 (5th Cir. 2000) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc), *overruled on other grounds by Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir.1997) (en banc)). We are to review the record as a whole, drawing all reasonable inferences in favor of the nonmoving party and without making credibility determinations or weighing the evidence. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 2110, 147 L. Ed. 2d 105 (2000). We also "give credence to...that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *See id.* at 151, 120 S. Ct. at 2110 (quoting 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure 2559, p. 300 (2d ed. 1995)). Finally, there must be more than a mere scintilla of evidence in the record to render the grant of JMOL inappropriate. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); *Krystek v. Univ. of So. Miss.*, 164 F. 3d 251, 255 (5th Cir. 1999).

Title VII makes it unlawful for an employer to discharge an employee because of her sex, which includes discrimination because of pregnancy.[10] *See* 42 U.S.C. § 2000e-2(a); 42 U.S.C. § 2000e(k) (defending sex discrimination as, *inter alia*, discrimination "because of or on the basis of pregnancy"); *Krystek*, 164 F.3d at 255-56. A plaintiff can prove intentional discrimination through either direct or circumstantial evidence. *See Urbano v. Cont'l Airlines, Inc.* 138 F.3d 204, 206 (5th Cir. 1998). Where the plaintiff offers circumstantial evidence, the *McDonnell Douglas*[11]*-Burdine*[12] framework requires the plaintiff

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[10] We need not analyze Wallace's TCHRA claim separately because generally such claims are analyzed under our Title VII precedent. *See Schackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 n.2 (5th Cir. 1999) ("[T]he law governing claims under the TCHRA and Title VII is identical."); *Rios v. Ind. Bayer Corp.*, 965 F. Supp. 919, 921 (S.D. Tex. 1997) ("[C]ourts must look to analogous federal law when resolving disputes brought under the [TCHRA].")

[11] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

to establish a prima facie case of discrimination, which, if established, raises a presumption of discrimination. *See Rutherford v. Harris County, Tex.*, 197 F.3d 173, 179-80 (5th Cir. 1999). The employer must then produce a legitimate nondiscriminatory reason for the adverse employment decision. *See Byers v. Dallas Morning News, Inc.* 209 F.3d 419, 425 (5th Cir. 2000). Once the employer produces a legitimate nondiscriminatory reason, the presumption of discrimination dissipates. *See Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 222 (5th Cir. 2000). The plaintiff bears the ultimate burden of persuading the trier of fact by a preponderance of the evidence that the employer intentionally discriminated against her because of her protected status. *See Burdine*, 450 U.S. at 253, 101 S. Ct. at 1093; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511-12, 113 S. Ct. 2742, 2749-50, 125 L. Ed. 2d 407 (1993).

"To carry that burden, the plaintiff must produce substantial evidence of pretext." *Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 402 (5th Cir. 2001). The plaintiff must put forward evidence rebutting each of the nondiscriminatory reasons the employer articulates. *See Rubinstein*, 218 F.3d at 400-01; *Rutherford*, 197 F.3d at 184; *see also Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1007 (7th Cir. 2001) (a plaintiff "must present facts to rebut each and every legitimate non-discriminatory reason advanced by [her employer] in order to survive summary judgement"). A plaintiff may establish pretext "by showing that a discriminatory motive more likely motivated" her employer's decision, such as through evidence of disparate treatment, "or that [her employer's] explanation is unworthy of credence." *Deffenbaugh-Williams v. Wal-Mart Stores Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) (quotations and citations omitted), *vacated by* 169 F.3d 215 (1999), *reinstated in pertinent part by* 182 F.3d 333 (1999).

In considering a motion for JMOL, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148, 120 S. Ct. at 2109. Nonetheless,

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[12] *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

"[w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id.* at 148-149, 120 S. Ct. at 2109.

In the case at bar, Methodist does not dispute that Wallace established a prima facie case of discrimination. In response to that prima facie case, Methodist proffered two legitimate nondiscriminatory reasons for discharging Wallace, both of which qualified for immediate termination under Methodist's written policies without regard to her past performance: (1) she performed a procedure, namely the insertion of a nasogastric tube, without receiving a physician's order even though Methodist's written policies required an order; and (2) she falsified medical records, in that she wrote a verbal order to insert the tube without having received an order. Wallace admitted removing the Salem Sump and inserting the smaller bore feeding tube without a doctor's order, and writing a verbal order into the patient's charts in spite of the absence of such an order. Wallace maintains, however, that she was subject to disparate disciplinary treatment, and, therefore, Methodist's stated reasons were a pretext for discrimination.

At the heart of whether the district court properly granted JMOL is whether Wallace introduced substantial evidence of pretext. To that end, Wallace maintains that she adduced evidence of disparate treatment and that the district court erred in finding that the examples proffered were not of similarly situated nurses. Further, Wallace asserts that the statements by Hahus and Schmitz are not merely stray remarks, as the district court concluded, but evidence of discriminatory intent. Finally, she avers generally that her prima facie case coupled with the evidence of pretext she presented, including examples of disparate treatment, Hahus's and Schmitz's remarks, Methodist's failure to investigate, and anecdotal notes kept by Hahus and Schmitz, was sufficient to avoid JMOL. We address each of these contentions in turn, finding none of them availing.

B

We held that in order for a plaintiff to show disparate treatment, she must demonstrate "that the misconduct for which she was discharged was nearly incidental to that engaged in by a[n] employee [not within her protected class] whom [the company] retained." *Smith v. Wal-Mart Stores* (No. 471)., 891 F.2d 1177, 1180 (5th Cir. 1990) (per curiam) (first and second alterations ours, third alteration in original) (quoting *Davin v. Delta Airlines, Inc.*, 678 F.2d. 567, 570, (5th Cir. Unit B 1982)); *see Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1089 (5th Cir. 1995); *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991); *see also Barnes v. Yellow Freight Sys., Inc.*, 778 F.2d 1096, 1101 (5th Cir. 1985) ("When a supervisor of one race treats employees of the same race more favorably than similarly situated employees of another race under circumstances that are *essentially identical*, a presumption of discriminatory intent is raised." (emphasis added)). Or put another way, the conduct at issue is not nearly identical when the difference between the plaintiff's conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer. *See Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 304-05 (5th Cir. 2000) (requiring the plaintiff to show that the company treated others differently in "nearly identical circumstances" and finding that "the striking differences between the two men's situations more than account for the different treatment they received"); *see also Polanco v. City of Austin, Tex.*, 78 F.3d 968, 977 (5th Cir. 1996) (where jury had to reject the employer's contention that two employees were not similarly situated, the "evidence had to contradict the legitimacy of the [employer's] explanation that the differences between [the two employees] justified" the difference in treatment).

As previously mentioned, Methodist articulated two nondiscriminatory reasons for terminating Wallace: (1) she performed a procedure, namely, the insertion of a nosogastric tube, without receiving a physician's order even though Methodist's written policies require a physician's order; and (2) she falsified medical records. With respect to the first reason Methodist articulated, we find, with but one exception, that the nurses to whom Wallace points are not similarly situated. The nurses acted under a doctor's orders, did not need a doctor's order for their

actions, or no one in a supervisory capacity was aware of the nurse's actions.

Wallace does, however, provide an example of a non-pregnant nurse that performed almost the exact procedure Wallace performed without having received a doctor's order. Although she did not first remove a Salem Sump, Cheryl Gray ("Gray") inserted a nasogastric tube without having received a doctor's order to do so.[13] Further, the patient's doctor did not want a tube inserted because the patient had recently had surgery in the area where the tube was placed. Hahus and Schmitz supervised Gray. Schmitz and Hahus did not terminate Gray for her actions; instead, they only verbally reprimanded her.

The district court held that the Gray incident did not constitute evidence of disparate treatment. We agree with Wallace that this example constitutes evidence of disparate treatment with respect to the first reason Methodist articulated. Methodist offered two *independent* reasons for terminating Wallace, each of which alone could have served as a basis for terminating her without regard to her past performance. Consequently, Gray did not have to also falsify the medical record, as the district court had required, in order for the incident to demonstrate disparate discipline as to Methodist's first reason.[14] Accordingly, we find that Wallace has put forward evidence of disparate treatment with respect to the first reason Methodist articulated.

Nevertheless, Wallace failed to proffer evidence that any non-pregnant nurse falsifying a patient's record received more favorable treatment. To the contrary, the record reflects that Methodist terminated another nurse for falsifying a medical record.

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[13] Although initially Wallace contends that Gray also recorded a verbal order for the procedure, thus falsifying the record as Wallace did, Wallace admits in her reply brief that Gray did not indicate on the patient's chart that she had inserted a nasogastric tube.

[14] We noted that Methodist did not assert that these two acts together constituted a single nondiscriminatory reason for Wallace's termination. As a result, we have focused solely on what Wallace must show in order to rebut *each* of the independent reasons Methodist asserts.

Thus, Wallace falls short of her burden of presenting evidence rebutting *each* of the legitimate nondiscriminatory reasons produced by Methodist.

C

In light of Wallace's failure to rebut each of the reasons Methodist proffered, the comments of Schmitz and Hahus must satisfy the test we laid out in *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996), in order to constitute sufficient evidence of discrimination. *See Rubinstein*, 218 F.3d at 4001-011; *Auguster*, 249 F.3d at 405 (concluding that while we had questioned the vitality of our stray remarks doctrine post-*Reeves*, the doctrine remained intact "at least where the plaintiff has failed to produce substantial evidence of pretext"). That test is: "[F]or comments in the workplace to provide sufficient evidence of discrimination, they must be '1) related [to the protected class of persons of which the plaintiff is a member]; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue.'" *Krystek*, 164 F.3d at 256 (alteration in original) (quoting *Brown*, 82 F.3d at 655). Where "[c]omments [] are vague and remote in time [they] are insufficient to establish discrimination. In contrast, specific comments made over a lengthy period of time are sufficient." *Brown*, 82 F.3d at 655-56 (internal quotations and citations omitted); *see Wyvill*, 212 F.3d at 304 ("in order for a [] [protected class-] based comment to be probative of an employer's discriminatory intent, it must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that [the employee's protected class] was a determinative factor in the decision to terminate the employee.").

Wallace points to two remarks Schmitz made: (1) "I don't know how to classify you because you were gone three months and now you'll be gone three months again"; (2) Schmitz's answer as to why Wallace was fired – "First of all, she's been pregnant three times in three years." Schmitz admitted that she may have made the first statement but explained that one of the factors for promotion was experience and that two years of experience was cut off. Schmitz was uncertain whether she should count the time Wallace spent on maternity leave as part of her experience. Schmitz's statement merely refers to Wallace's absences from

work due to her maternity leaves. It is only if we infer that Schmitz's reference to Wallace's absences is code language for Wallace's pregnancies that it relates to Wallace's protected class. If we were to make this inference and countenance this general statement as evidence of discriminatory intent, we would find in effect that any employer's remark observing that an employee has taken leave constitutes such evidence. We decline to do so for, as the Seventh Circuit has stated, "[t]he [Pregnancy Discrimination Act] requires the employer to ignore an employee's pregnancy, but...not her absence from work, unless the employer overlooks the comparable absences of non-pregnant employees." *Marshall v Am. Hosp. Ass'n*, 157 F.3d 520, 526 (7th Cir. 1998) (quoting *Troupe v. May Dep't Stores*, 20 F.3d 734, 738 (7th Cir. 1994) (holding that the supervisor's failure to give employee new assignments once she announced that she was pregnant and that her maternity leave would occur during the two months prior to the employer's busiest time did not constitute evidence of discrimination.)

Next, Gaskin overheard Schmitz state that Wallace was fired because "[f]irst of all, she's been pregnant three times in three years." In support of her contention that Schmitz's comment is probative evidence of discriminatory intent, Wallace relies on *EEOC v. Manville Sales Corp.*, 27 F.3d 1089 (5th Cir. 1994). Rather than demonstrating the probative value of Schmitz's comment, *Manville* illustrates why Schmitz's comments fails to satisfy the *Brown* test. In *Manville*, the evidence established that Morris, the district manager of the area in which the plaintiff worked as sales representative, though not the ultimate decision-maker, recommended the plaintiff's discharge. *See id.* at 1091. By contrast, while Schmitz participated in the investigation of the incident that led to Wallace's termination, Wallace presented no evidence that Schmitz recommended termination or otherwise participated in the decisionmaking process. *See Nicols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 42 (5th Cir. 1996) ("To be probative, allegedly discriminatory statements must be made by the relevant decision maker."); *see also Haas v. ADVO Sys., Inc.*, 168 F.3d 732, 733-34 (5th Cir. 1999) (interviewer's comment that his "only concerns about hiring [the plaintiff] were [his] age" constituted indirect evidence of discrimination because the jury

could infer that the interviewer's discriminatory view tainted his recommendation against hiring plaintiff and that the ultimate decisionmaker relied on this recommendation (first alteration ours, second alteration in original). Furthermore, because Schmitz did not participate in the decision to terminate Wallace and Schmitz's statement offers no indication that she was privy to those reasons, Schmitz's statement is, at best, her opinion of why Methodist terminated Wallace. We have previously held that a similar statement was merely a stray remark where the statement reflected solely the speaker's opinion of the basis for an employment decision and the speaker had not exercised influence over that process. *See Krystal,* 164 F.3d at 256. Thus, Schmitz's comment is not evidence of intentional discrimination.

Wallace points to the following remarks made by Hahus: (1) "How stupid could you be?"; (2) "You are still costing the hospital money because you are receiving full benefits and giving 80 hour pay periods"; and (3) Wallace "needed to choose between nursing and family." As an initial matter, Hahus's remarks satisfy *Brown's* third cirterion, i.e., that a person with authority over the employment decision has made the comment. We find that Hahus's comments are nonetheless deficient under the remaining *Brown* factors.

Hahus made the first remark sometime within the six months prior to Wallace's discharge. This comment is neither related to Wallace's protected class nor is it related to her termination. The word "stupid" is not an epithet or a slur referring to a pregnant woman, it simply denotes a lack of intelligence. That Hahus intended this denotation is borne out by the circumstances prompting this comment – Wallace drew blood to test the level of drug she had just administered, fully knowing that it would register a "false high." *See EEOC v. Tex. Instruments Inc.*, 100 F.3d 1173, 1181 (5th Cir. 1996) (holding that statement was stray remark where it was "consistent with the context in which it was allegedly made"). Thus, we concluded that this statement does not constitute evidence of discrimination.

Sometime shortly after Wallace's return to work from her second maternity leave, Hahus also remarked to Wallace that she was "still costing the hospital money because [she was] receiving full benefits and giving 80 hour pay periods." Wallace's testimony

established hat Hahus mentioned the availability of the compressed schedule to a group of nurses, among whom Wallace was standing. Wallace then expressed her desire to work a compressed schedule to which Hahus responded with the above comment. In context, the comment is simply a statement of Hahus's view of the compressed schedule program. *See id.* This remark had nothing to do with Wallace's status as a pregnant woman or any future employment decision and it is not probative of discriminatory intent.

Wallace contends that Hahus's statement that Wallace "needed to choose between work and family" is akin to the supervisor's comment to the plaintiff in *Deffenbaugh-Williams* that the plaintiff would "never move up with the company being associated with a black man." 156 F.3d at 584. We disagree. The statement in *Deffenbaugh-Williams* unequivocally related to the plaintiff's ability to advance in her workplace solely because of her relationship with an African-American man. By contrast, here, while Hahus's comment may reflect a stereotype about a woman's commitment to the workplace while maintaining a family life,[15] it does not relate specifically to an employment decision of any kind as did the statement in *Deffenbaugh-Williams*. Additionally, in the same meeting in which Hahus made this comment, she nonetheless gave Wallace a satisfactory evaluation, resulting in a merit pay raise. Therefore, we find that the statement is not probative evidence of discriminatory intent. In short, we find that none of the statements made by Schmitz or Hahus constitute sufficient evidence of discriminatory intent.

D

Finally, Wallace contends generally that the district court "invaded the province of the jury" in granting Methodist's motion for JMOL. Specifically, Wallace asserts that she presented substantial evidence of pretext, i.e., evidence of disparate treatment, Hahus's and Schmitz's remarks, Methodist's failure to investigate, and the anecdotal notes Schmitz and Hahus kept. She further maintains that her prima facie case considered in tandem

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[15] *See, e.g.*, Deborah L. Rhode, *Speaking of Sex: The Denial of Gender Equality* 153 (1997) (arguing that "women who make families a priority . . . hear that they are not sufficiently 'committed' to their careers").

with the substantial evidence of pretext rendered the district court's grant of JMOL inappropriate under *Reeves*. We find these contentions unavailing.

In support of her argument that she proffered substantial evidence of pretext, Wallace reiterates her contentions regarding the evidence of disparate treatment and Hahus's and Schmitz's statements. As examined above, Wallace failed to offer evidence rebutting both of the legitimate nondiscriminatory reasons Methodist produced, and the remarks on which she relies cannot alone constitute sufficient evidence of discrimination.

The record also belies Wallace's contentions regarding Methodist's failure to investigate the incident leading to her termination. Trial testimony showed Schmitz spoke with both Dr. Barrosa and Dr. Hanania regarding the incident. At Hahus's direction, Schmitz also contacted Wallace to ascertain whether Wallace had written a verbal order and inserted the feeding tube, both without having received a doctor's order. Wallace admitted that she had done so and Schmitz informed Hahus as such. Hahus verified with Dr. Hanania that he had not given Wallace a verbal order to insert the feeding tube. Regarding the incident, Hahus consulted with the chairman of the peer review committee, Methodist's director of medicine, and Hansen, Methodist's director of nursing and Hahus's supervisor. Although Wallace makes much ado about Hahus not contacting Methodist's Human Resource Department, testimony established that Hansen consulted with the department, thereby complying with Methodist's own procedures.

Additionally, Wallace requested and received an informal grievance hearing. At that hearing, Wallace again admitted inserting the tube and writing the order without the requisite physician's order. In her defense, she alleged that other nurses routinely engaged in the same conduct for which she was being terminated. Wallace faults Methodist for not investigating this general allegation. In light of the undisputed evidence of the steps Methodist took to investigate the incident and Wallace's repeated admissions to the acts that were the basis for her termination, that Methodist did not investigate Wallace's generalized opinion that she was subject to disparate treatment does not demonstrate pretext. *Cf. Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1186

(5th Cir. 1997) (finding that the plaintiff's conclusory assertions of less favorable treatment, absent specific examples, were insufficient to establish discrimination).

Wallace also asseverates that anecdotal notes kept by Hahus and Schmitz showed discriminatory animus. The fact that Hahus and Schmitz kept these notes does not in and of itself demonstrate discriminatory intent because Hahus and Schmitz kept notes regarding *every* MICU employee. The notes chronicled incidents in each employee's performance. Hahus and Schmitz used these notes to assist in their formal performance evaluations of MICU employees and to address problems and employee might have without immediate resort to Methodist's more formal due process system.

Wallace asserts that these notes are "replete with references to her consecutive maternity leaves and contain increasingly critical remarks with each pregnancy." The references in the notes to Wallace's maternity leaves merely mention that Wallace had been on leave. Critical comments are made throughout the notes regarding Wallace's performance. Moreover, Wallace's termination was made without regard to her past performance, rendering these notes irrelevant rather than demonstrative of discriminatory animus, as Wallace contends.

Wallace's failure to proffer substantial evidence of pretext undermines her related contention that the evidence of pretext coupled with her prima facie case provides sufficient evidence of discrimination to withstand a motion for JMOL

III

In sum, the evidence is undisputed that Wallace engaged in the acts for which Methodist terminated her. Further, although she adduced evidence rebutting one of the legitimate nondiscriminatory reasons Methodist produced, she failed to proffer evidence rebutting the second reason, namely, the falsification of medical records. Neither the comments on which she relied nor the anecdotal notes demonstrated discriminatory intent. Finally, the record reveals that Methodist conducted an investigation of the incident giving rise to Wallace's termination. We conclude that there was no legally sufficient basis from which the jury could conclude that Wallace had been discharged because

of discrimination. Accordingly, the district court did not err in granting Methodist's motion for JMOL.

For the foregoing reasons, we AFFIRM.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20255

VERONICA A WALLACE

Plaintiff – Appellant

v.

THE METHODIST HOSPITAL SYSTEM

Defendant – Appellee

Appeal from the United States District Court for the
Southern District of Texas, Houston

ON PETITION ON REHEARING EN BANC

(Opinion 11/07/01, 5 Cir. , _____, _____ F.3d _____)

Before EMILIO M. GARZA and PARKER, Circuit Judges, and HINOJOSA*, District Judge.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Hearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed.R. App.P. and the 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/Emilio M. Garza/
United States Circuit Judge

* District Judge of the Southern District of Texas, sitting by designation

REHG – 6a

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA WALLACE,	§	
	§	
Plaintiff,	§	
	§	CA NO. H-97-0095
	§	
THE METHODIST HOSPITAL SYSTEM,	§	
	§	
	§	
Defendant.	§	

MEMORANDUM AND OPINION

In this pregnancy discrimination case, plaintiff Veronica A. Wallace sued her former employer, The Methodist Hospital System ("Methodist"), for wrongful termination, alleging violations of section 701 (k) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e(k), and section 5.01 of the Texas Commission on Human Rights Act, TEX. LABOR CODE ANN. § 21.051 (Vernon's 1996). (Docket Entry No. 1). Methodist terminated Wallace's employment as a nurse in the Medical Intensive Care Unit in December 1994, near the end of Wallace's third pregnancy in three years. Wallace alleged that Methodist terminated her employment because of her repeated pregnancies. Methodist responded that it discharged Wallace because she violated hospital policy by carrying out a medical procedure that required a doctor's order without obtaining such an order and by falsifying a medical record to show that a doctor's order had been given. A first trial ended in a hung jury and mistrial. The jury in the second trial found in favor of Wallace, awarding her $70,000 in compensatory damages and $437,500 in punitive damages. Methodist has moved for judgment as a matter of law ("JMOL") under Rule 50(b) of the Federal Rules of Civil Procedure. (Docket Entry No. 117).

Methodist and Wallace filed a number of briefs addressing the post-verdict issues. (Docket Entry Nos. 119, 127, 130, 131, 132, 133).[1] Based on a careful consideration of the motion, the briefs, the parties' submissions, the trial record, and the applicable law, this court GRANTS Methodist's motion for judgment as a matter of law.[2] The reasons are set out below.

I. Background: The Evidence at Trial

Wallace began working at Methodist in March 1986 as a blood Collector. (Tr. 183).[3] She later moved to the neurophysiology department, working there as an EEG technician until 1991. (Tr. 183-185). She entered nursing school in 1990 and became a student professional nurse in the intensive care unit in 1991. (Tr. 187-188, 192). Wallace received her Bachelor of Science in Nursing in April 1992. (Tr. 193).

Wallace accepted a job as a registered nurse ("RN") in Methodist's medical intensive care unit ("MICU") on October 1, 1992. (Tr. 204; P. EX. 2). Wallace was pregnant when she began working in the MICU. Nurse Manager Donna Hahus supervised

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[1] Wallace moved under Rule 5(a) of the Federal Rules of Civil Procedure to strike portions of the trial transcript that were referenced in Methodist's May 4, 1999 brief, (Docket Entry No. 127), but not attached to the brief or served on Wallace. (Docket Entry No. 128). This court cannot strike the trial transcript from the record; it is part of the record. Wallace's motion to strike portions of the trial transcript is DENIED.

Wallace also moved to strike newspaper articles that were attached to Methodist's May 4, 1999 filing. (Docket Entry No. 130, p. 20). This court did not consider those articles in deciding the motion for judgment as a matter of law. Wallace's motion to strike the articles is DENIED as MOOT.

[2] Because this court finds that there was insufficient evidence to hold Methodist liable, this court does not reach the parties' motions as to damages. (Docket Entry No. 115).

[3] "Tr. __" refers to the transcript of the December 1998 trial, found at Docket Entry Nos. 121-126. Plaintiff's exhibits and defendant's exhibits from this trial are referred to as "P. Ex. __" and "D. Ex.__," respectively.

the approximately thirty-two nurses in the MICU. Tory Schmitz was Wallace's direct supervisor.

Wallace took a three month leave after the birth of her first child, from February 23, 1993 to June 5, 1993. (Tr. 1049; D. Ex. 15). Wallace received full pay and benefits throughout her maternity leave, using accumulated sick time, holiday time, and vacation time. (Tr. 219, 1049). When Wallace returned to work in June 1993, she used options Methodist made available to change her shift time from day to evening and began working a compressed-time schedule of three twelve-hour shifts, primarily on weekends. (Tr. 221-22, 246-47, 561-62).

Wallace testified that Hahus had become "less friendly" when Wallace returned to work after her first maternity leave, which Wallace asserted as evidence of Hahus's discriminatory animus. Wallace also testified that Hahus and Methodist allowed Wallace to work the hours and shifts she wanted when she returned from leave in June 1993. Wallace testified that, in her March 1994 evaluation, Schmitz and Hahus made statements that evidence discrimination. Wallace testified that Schmitz stated that Wallace was difficult to categorize because of her pregnancy-related absences, (Tr. 237), and that Hahus said she needed to "choose between nursing and family." (Tr. 227, 235-37). Schmitz acknowledged that Wallace's absences made it difficult to apply certain objective evaluative criteria to her. (Tr. 1003). Hahus denied making the statement attributed to her, instead testifying that she and Schmitz had some concerns about Wallace's recent performance that they raised in the meeting with Wallace. Wallace's evaluation score dropped 10 points from a year earlier, when she was also pregnant. However, Hahus and Schmitz testified that they gave Wallace satisfactory evaluations. There is no suggestion in the record that Wallace received a poor evaluation, that she missed any pay raise, or that her performance evaluations were a factor in the discharge decision.

The trial testimony was also undisputed that during Wallace's three-month maternity leave for the birth of her second child, from March 2, 1994 to June 5, 1994, Hahus helped Wallace maximize the amount of leave time for which she could be paid. During this maternity leave, Wallace had less accumulated time to draw upon than she had had during her first leave. Although a

substantial part of the second maternity leave was unpaid, Hahus classified Wallace's maternity leave as excused absences rather than as unpaid leave, which allowed Wallace to continue accruing benefits, including vacation time, during her leave. (Tr. 1050). With Hahus's help, Wallace was able to increase the paid portion of her maternity leave. (Tr. 1050; D. Ex. 17).

Wallace returned to work on June 5, 1994. She learned that she was pregnant a short time later. (Tr. 248). When Wallace returned to work, she again used the compressed-time scheduling option to work the hours she chose—three 12-hour shifts each week instead of five 8-hour shifts. (Tr. 246, 626). Wallace received merit raises during this period. (Tr. 246). She continued to work full-time, on the schedule she selected, until her discharge.

Methodist fired Wallace on December 21, 1994, (D.Ex. 22), following an incident that occurred two days earlier. On December 19, 1994, Wallace performed a procedure on a patient without a physician's order to do so, and wrote in the patient's chart that a doctor had given Wallace a verbal order to do the procedure. Wallace had no such order when she made the entry and did the procedure. Wallace did not dispute that the incident occurred. However, she claimed that Methodist used the incident as a pretext for discrimination, in fact firing her because Donna Hahus "resented [her] being pregnant." (Tr. 252). At trial, Wallace presented evidence that she claimed demonstrated disparate discipline, that other nurses had similarly performed procedures without obtaining doctor's orders in advance, but with no adverse consequences. Wallace also pointed to the negative comments by Hahus and Schmitz in March 1994, and to comments in August 1994 and shortly after the discharge as "direct evidence" of discriminatory motive. (Docket Entry No. 119, p. 7).

Methodist contended that the decision to discharge Wallace had nothing to do with her pregnancies. Methodist told Wallace that she had been terminated because, on December 19, 1994, she "falsif[ied] a hospital record by writing a verbal order for a specific procedure that required a physician's order under hospital policy [] and then implement[ed] the procedure without a physician's knowledge or consent." (Docket Entry No. 117, p. 2). Methodist gave the same reason for Wallace's discharge at trial and in this motion.

Much of the relevant evidence as to the December 19, 1994 incident is undisputed. Wallace worked the 7:00 a.m. to 7:00 p.m. shift in the MICU that day. A patient of Dr. Kenneth Scott Lloyd, identified in the record as "Mr. B," was in the unit recovering from surgery on his aorta. (Tr. 718). Dr. Lloyd is an internal medicine and pulmonary disease specialist. (Tr. 715). By Dr. Lloyd's order, a Salem sump—a tube threaded through the nose to the stomach—had previously been inserted into Mr. B. The Salem sump permitted the doctors and nurses to deliver medicine to Mr. B, to check the amount of fluids in his stomach, and to decompress his stomach if gastric residuals built up. (Tr. 721-22, 851-53). If gastric residuals built up in the stomach and were not promptly suctioned out, Mr. B risked aspiration pneumonia, which he had previously contracted. (Tr. 720).

At 11:00 a.m. on December 19, Dr. Albert Barroso, a gastroenterologist assisting Dr. Lloyd, issued a written order to begin tube feeding Mr. B. (Tr. 872; D. Ex. 1, tab 32). The written order said nothing about removing the Salem sump, which can be used as a feeding tube, (Tr. 272), or about inserting a different tube. At 4:00 p.m., without checking with any doctor, Wallace removed the Salem sump, from Mr. B. and replaced it with a small bore feeding tube. (Tr. 273-274). In the patient's record, Wallace wrote a "verbal order," a written statement that she had received an oral order from a doctor, to "place feeding tube and follow –up with X-ray." Wallace wrote the order to show that Dr. Nicola Hanania, a medical fellow in the MICU, had given the verbal order. (Tr. 273-74; D. Ex. 1, tab 32). Wallace signed her name next to the chart entry. (D. Ex. 1, tab 32).

At trial, Wallace admitted that Dr. Barroso, in his written order, had only ordered her to "begin tube feeding," not to replace the Salem sump with a small bore feeding tube. (Tr. 263-64). Wallace admitted that it was possible to use a Salem sump for feeding. (Tr. 272). Wallace admitted that, contrary to the written entry she made on Mr. B's chart, Dr. Hanania had not given her an verbal order to place a small bore feeding tube in the patient. (Tr. 388). Wallace also acknowledged that removing the Salem sump was not an emergency procedure, that there was time to ask a doctor before she proceeded, and that there were doctors readily

available for consultation before she removed the Salem sump and replaced it with a small bore tube. (Tr. 379-83).

Wallace's testimony was clear:

> Q: All right. And it says on [the counseling record] that, "On December 19th, made false entry in medical record. VW performed a procedure on a patient without a physician's order, then wrote as a verbal order. No verbal order had been given." Now, the factual part of that is correct, is it not, that you did perform a procedure on the patient without a physician's order; is that correct?
>
> A: Correct.
>
> Q: All right. And then you wrote a verbal order?
>
> A: Correct.
>
> Q: And that no verbal order had been given, that's all correct, is it not?
>
> A: Yes, that's correct.
>
> Q: Okay. Now, did you sign that document?
>
> A: Yes, I did.

(Tr. 388).

When Dr. Lloyd made his rounds in the late afternoon or evening of December 19, he noticed that the Salem sump had been removed from Mr. B and had been replaced with a small bore feeding tube. (Tr. 722). Dr. Lloyd looked at the patient's chart and saw the written entry, signed by Veronica Wallace, stating that Dr. Hanania had given a verbal order to remove the Salem sump and replace it with the small bore feeding tube. Dr. Lloyd quickly found Dr. Hanania and asked why he had given nurse Wallace the order to change the patient's tube. (Tr. 745-46). Dr. Hanania explained that he had given no such order. (Tr. 807). Dr. Lloyd then went to talk to Wallace.

Dr. Lloyd and Wallace gave conflicting testimony about this conversation. Dr. Lloyd testified that he asked Wallace why she had removed the Salem sump and inserted the feeding tube without a doctor's order and why she had written false order on the chart. (Tr. 746-47). Dr. Lloyd testified that Wallace said that "[s]he thought the patient would do better with a smaller feeding

tube instead of the nasogastric tube [Salem sump]." (Tr. 747). Dr. Lloyd testified that he told Wallace that "if she writes an order that the doctor did not give her, then that is falsification of a medical record, a lie." (*Id.*). Dr. Lloyd also said that he told her that 'it's practicing medicine without a license to write down that you're going to put in tubes and do X-rays" because a nurse "can't just do an X-ray and put a tube in the patient without a physician's order." (*Id.*). Wallace testified that when Dr. Lloyd confronted her, he did not question the order after he confirmed that the placement of the tube was satisfactory, except to blame the fellows, such as Dr. Hanania, for writing in "his" charts. (Tr. 277-79). Mr. B suffered no harm from the tube change.

At trial, Wallace explained that she had planned to have Dr. Hanania cosign the order before her shift ended at 7:00 p.m. (Tr. 265, 405, 462). However, Dr. Lloyd discovered that the tube had been changed before Wallace had spoken to Dr. Hanania. (Tr. 277-79). Based on this explanation, Wallace denied that her conduct was properly characterized as making a false entry in the patient's chart; even if the chart entry was false when Wallace wrote it, she intended to make it true a short time later by having a doctor authorize the procedure after the fact.[4] Before Wallace finished her shift and talked to Dr. Hanania, Dr. Lloyd discovered that Wallace had performed the procedure without a doctor's order and had written an verbal order in the chart without obtaining such an order. (Tr. 181, 251, 405).

The testimony was undisputed that regardless of what Dr. Lloyd told Wallace on the evening of December 19, 1994, he talked to Tory Schmitz, the MICU clinical supervisor and Wallace's direct supervisor, about the incident the next day. (Tr. 752, 1017). Dr. Lloyd told Schmitz that Wallace "had written an order that was not given, and that she had placed the tube without an order. Ordered an X-ray without an order, ...and that this was practicing medicine without a license." (Tr. 753). Schmitz spoke to Dr. Barroso and Dr. Hanania, both of whom denied having given Wallace an order to change the tube. (Tr. 1018).

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[4] Wallace's expressed intent to obtain Dr. Hanania's signature after she had already performed the procedure does not explain how the order would then be "true": the chart entry reflected that a doctor had ordered the procedure to be performed, not authorized it after the fact.

Later on December 20, Schmitz told Hahus about the incident. (Tr. 1018). Hahus asked Schmitz to telephone Wallace, who had called in sick for work that day. (*Id.*). Schmitz telephoned Wallace to discuss the incident. (Tr. 1019). Schmitz testified that Wallace admitted that she removed the Salem sump and that she had not received an order to do so. (Tr. 1019). Wallace told Schmitz that she would not take such a step again. (Tr. 1020). Schmitz relayed Wallace's statements to Hahus, including that Wallace "admitted that she had written the verbal order, and that she didn't have a verbal order." (Tr. 633).[5]

Hahus consulted Marcella Louis, a nursing director who chaired the Methodist peer review committee, and Paula Hansen, the nursing director and Hahus's supervisor, about the proper response to Wallace's conduct. (Tr. 633-34). The record does not disclose the substance of Hanus's conversation with Louis. Hansen, who did not know that Wallace was pregnant, agreed with Hahus's opinion that termination would be justified if a nurse had written an entry in a patient chart showing a verbal order from a doctor for a procedure that required a doctor's order, without receiving such an order, and had implemented the procedure without such an order. (Tr. 1076-77).[6] After talking to Louis and Hansen, Hahus recommended that Wallace be terminated for violating Methodist's written policies by making a false entry into a patient chart and performing a medical procedure that required a doctor's order without receiving such an order. (Tr. 635).

On December 21, 1994, Hahus telephoned Wallace to tell her that she had been discharged. (Tr. 635-36). On the same date, Wallace received a Due Process Corrective Counseling Record stating that Methodist was terminating Wallace's employment because she had committed a "Class I Violation: Unprofessional Conduct detrimental to patient care." (D.Ex. 22). The counseling

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[5] Wallace did not dispute this evidence, although she also recalled that Schmitz criticized Dr. Barrosa for not specifying how he wanted the tube feeding administered. (Tr. 282-83). Schmitz denied criticizing Dr. Barrosa. (Tr. 1020).

[6] Hansen also spoke to Leslie Wagner, an employee in human resources, about Wallace. Wagner supported the decision to terminated Wallace. (Tr. 1078-79).

record read: "On December 19, 1994, [Wallace] made false entry in medical record. [Wallace] performed a procedure on a patient without a physician's order then wrote as a verbal order. No verbal order has been given." (*Id.*).

Under Methodist's Official Due Process Procedures, a Class I violation is "a serious violation of System standards under circumstances, that, after thorough consideration of the facts, may justify termination for a first violation without regard to the employee's length of service or prior record of conduct." (D. Ex. 4, Official Procedure No. P001, Revision No. 5, p. 2). The procedures provide a nonexhaustive list of 16 types of Class I violations. The list includes: (1) "Willful action or illegal, unprofessional or unethical conduct detrimental to patient care...that result in neglect, abuse, or exploitation of any patient;" and (2) "Deliberate omission of information, falsification of employee/employer records, or falsifying information to management regarding their availability for work, job duties, or performance." (D. Ex. 4, Official Procedure No. P001, Appendix A, p.1). Methodist asserts that Wallace violated both of these provisions by falsifying a verbal order for a medical procedure and undertaking the procedure without a doctor's authorization. The failure to obtain a physician's order for the insertion or removal of a nasogastric feeding tube, which includes a Salem sump, is a violation of Methodist's official written policies. (D. Ex. 4, Policy No. D-707, Revision No. 3, p.1).

Wallace filed a grievance seeking reversal of her termination and attended an informal grievance meeting with Hahus, Schmitz, Hansen, and Wagner. (Tr. 636, 1076). At that meeting, Wallace argued that other MICU nurses had similarly performed procedures without doctor's orders and had not been terminated. Methodist upheld the termination and denied Wallace's request to "proceed to formal conflict resolution." (Tr. 636; D. Ex. 25).

Methodist presented undisputed evidence that of the thirty-two nurses in MICU working under Donna Hahus's supervision, (Tr. 1000), ninety percent are female, over fifty percent are married, and that from three to seven give birth each year. (Tr. 1046-47). Most of the nurses who give birth take maternity leave and return to work. (Tr. 1023). Wallace did not dispute that in the

MICU, Methodist employed a number of other nurses who became pregnant, took maternity leaves and returned to work, without adverse employment consequences, while working under Hahus's supervision. Wallace asserted that her case was different because she became pregnant three times in three years.[7]

Wallace brought this lawsuit on January 14, 1997, asserting that Methodist has discriminated against her because of her pregnancies, in violation of Title VII and the Texas Labor Code. This case was first tried in September 1998, but ended in a mistrial after the jury was unable to reach a verdict. After a second trial, the jury found in favor of Wallace, awarding her $70,000 in compensatory damages and $437,500 in punitive damages. Methodist filed a post-verdict motion renewing its motion for JMOL at the close of evidence, arguing that Wallace did not submit sufficient evidence to support the jury's finding of liability. Methodist argues in the alternative that if this court finds sufficient evidence to support the liability determination, it should partially remit the compensatory damages award and fully remit the punitive damages award.[8]

The court considers Methodist's motion below.

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II. The Applicable Legal Standards

A. The Standard for a Motion for Judgment As a Matter of Law

"A motion for judgment as a matter of law...in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict." *Scott v. University of Mississippi*, 148 F.3d 493, 503 (5th Cir. 1998) (quoting *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir. 1997)) (alteration in original). Under Rule 50 of the Federal Rules of Civil Procedures, a district court "may grant a judgment as a matter of law if after a party has been

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[7] Wallace's assertion that Hahus singled her out for discrimination because she was repeatedly pregnant is in tension with Wallace's testimony that Hahus exhibited resentment that showed discrimination toward Wallace as soon as she returned from her first maternity leave.

[8] Wallace concedes that the total damage award exceeds the $300,000 statutory cap applicable to this case, 42 U.S.C. § 1981 a(b)(3)(D), and does not oppose a remittitur to conform to that cap. (Docket Entry No. 119, p. 40-41).

fully heard by the jury on an issue, 'there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue.'" *Aetna Cas. & Sur. Co. v. Pendleton Detectives of Miss., Inc.*, 182 F.3d 376, 377-78 (5th Cir. 1999) (quoting FED. R. CIV. P. 50).[9] "[A] court should grant a motion for judgment as a matter of law "not only when the non-movant presents no evidence, but also when there is not a sufficient conflict of substantial evidence to create a jury question.'" *Id.* at 504 (quoting *Travis v. Board of Regents of the Univ. of Tex. Sys.*,

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[9] Rule 50 provides in part:

(a) Judgment as a Matter of Law

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,
(B) order a new trial, or
(C) direct entry of judgment as a matter of law....

122 F.3d 259, 263 (5th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998)). "Substantial evidence is defined as 'evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions.'" *Id.* (quoting *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc)).

In conducting this review, the district court "accord[s] great deference to the jury's verdict." *Baltazor v. Holmes*, 162 F.3d 368, 373 (5th Cir. 1998). The court "view [s] the entire record in the light of most favorable to the non-movant, drawing all factual inferences in favor of the non-moving party, and 'leaving credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts to the jury.'" *Aetna Cas. & Surety Co. v. Pendleton Detectives of Miss., Inc.*, 182 F.3d 376, 378 (5th Cir. 1999) (quoting *Conkling v. Turner*, 18 F.3d 1285, 1300 (5th Cir. 1994)). A court may grant a motion for JMOL "only when the facts and reasonable inferences are such that a reasonable juror could not reach a contrary verdict." *Baltazor*, 162 F. 3d at 373; see also *Texas Farm Bureau v. United States*, 53 F. 3d 120, 123 (5th Cir. 1995).

A district court may review a party's post-verdict motion for judgment as a matter of law only if the party first moved for JMOL at the conclusion of all the evidence in the case. See *Allied Bank-West v. Stein*, 996 F. 2d 111, 114-15 (5th Cir. 1993); see also *United States ex rel. Wallace v. Flintco Inc.* 143 F.3d 955, 960 (5th Cir. 1998). A motion for JMOL at the close of the evidence is a prerequisite to the district court's review of a post-verdict motion for JMOL, being "virtually jurisdictional." *Stein*, 996 F.2d at 114-15 (quoting *Perricone v. Kansas City S. Ry. Co.*, 704 F.2d 1376, 1380 (5th Cir. 1983)).

"It is well-settled in this circuit that a motion for judgment as a matter of law filed post verdict cannot assert a ground that was not included in the motion for judgment as a matter of law made at the close of the evidence." *Morante v. American Gen. Fin. Ctr.*, 157 F.3d 1006, 1010 (5th Cir. 1998). "This requirement both enables the trial court to re-examine the sufficiency of evidence as a matter of law if the jury returns a verdict contrary to the movant and alerts the opposing party to insufficiencies in time to cure defects in proof." *Delta-X Corp. v. Baker Hughes Prod. Tools.*

Inc., 984 F.2d 410, 413 (Fed. Cir. 1993); see also *MacArthur v. University of Texas Health Ctr.*, 45 F.3d 890, 896 (5th Cir. 1995).

B. The Title VII standard

Under Title VII, it is unlawful for any employer "to discharge any individual ... because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The Pregnancy Discrimination Act of 1978 amended Title VII to provide that pregnancy discrimination was a form of sex discrimination. *See* Pub. L. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)). The Act provides in pertinent part:

> the terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes...as other persons not so affected but similar in their ability or inability to work....

42 U.S.C. § 2000e(k).

The Fifth Circuit extensively analyzed the Pregnancy Discrimination Act in *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 509 (1999). In that case, an airline ticket agent requested a light duty assignment due to pregnancy-related back pains and lifting restrictions. Continental Airlines, her employer, denied her request. The airline's policy provided for mandatory light duty transfers only for employees who suffered an occupational injury. The Fifth Circuit found that the plaintiff was denied a light-duty assignment under Continental's policy because her back troubles were not work related. The plaintiff failed to establish discrimination under Title VII because she could not prove she was treated differently from any other employee who suffered from non-occupational injuries: "Continental treated Urbano in exactly the same manner as it would have treated any other worker who was injured off the job...Under [the Pregnancy Discrimination Act], an employer is [only obliged to ignore a woman's pregnancy and 'to treat the employee as well as it would have if she were not pregnant.'" *Id.*

at 206. "Continental was entitled to deny Urbano a light-duty assignment as long as it 'treated similarly affected but nonpregnant employees' the same." *Id.* (quoting *Troupe v. May Dep't Stores*, 20 F.3d 734, 738 (7th Cir. 1994).

Pregnancy discrimination claims are analyzed under "the disparate treatment analysis applied in other Title VII discrimination cases." *LaFleur v. Westridge Consultants, Inc.*, 844 F. Supp. 318, 324 (E.D. Tex. 1994). In general, a Title VII plaintiff can prove discrimination in two ways, either by direct evidence or by the indirect or inferential method of proof. *See Mooney v. Aramco Servs.*, Inc., 54 F.3d 1207, 1217 (5th Cir. 1995). If the plaintiff produces sufficient direct evidence to show that unlawful discrimination was a motivating factor in the challenged employment action, the burden of proof shifts to the defendant employer to show by a preponderance of the evidence that it would have made the same decision even if it had not allowed discrimination to play such a role. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989).[10]

"A plaintiff who can offer sufficient direct evidence of intentional discrimination should prevail, just as in any other civil case where a plaintiff meets his burden." *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 40 (5th Cir. 1996). "Direct evidence is evidence which, if believed, would prove the existence of a fact (i.e., unlawful discrimination) without any inferences or

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[10] In *Price Waterhouse*, the Supreme Court held that if an employer showed that it would have made the same decision absent the impermissible discrimination, then the employer had not violated Title VII. *Id.* at 244-45. Subsections 107(a) and 107(b) of the Civil Rights Act of 1991, codified at 42 U.S.C. § 2000e-2(m) and 42 U.S.C.§ 2000e-5(g)(2)(B) respectively, amended Title VII to provide that, in such a case, the employer had violated Title VII and to allow the plaintiff to be awarded declaratory relief, injunctive relief, and attorney's fees, but not other kinds of relief, such as damages or reinstatement. In this case, however, neither side presented a mixed-motive case. Wallace argued at trial, and reurges now, that she was discharged solely because Donna Hahus resented Wallace's three pregnancies in her three years in the MICU. Methodist argued at trial, and reasserts here, that the evidence of discrimination is wholly insufficient in light of the overwhelming evidence that Wallace was discharged because she violated hospital policies.

presumptions." *Nichols*, 81 F.3d at 958; see also *Mooney*, 54 F.3d at 1217; *Brown v. East Miss Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993).

"[B]ecause direct evidence of discrimination is rare, the Supreme Court has devised an evidentiary procedure that allocates the burden of production and establishes an orderly presentation of proof in discrimination cases [when direct evidence is lacking]." *Nichols*, 81 F.3d at 40; see also *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993). A pregnancy discrimination case brought under Title VII is subject to this burden-shifting approach, developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).[11] See *Urbano v. Continental Airlines, Inc.*, 138 F. 3d 204, 206 (5th Cir. 1998); Scott, 148 F.3d at 504 (ADEA case); *Travis*, 122 F.3d at 263 (Title VII case). "When a case has been fully tried on the merits, however, '[a court] need not parse the evidence into discrete segments corresponding to' the different stages of the *McDonnell Douglas-Burdine* framework." *Scott*, 148 F.3d at 504 (quoting *Travis*, 122 F.3d at 263). Instead, a court

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[11] Under this frame work, a Title VII plaintiff unable to produce direct evidence of discrimination carries "the initial burden...of establishing a prima facie case of discrimination." *McDonnell Douglas*, 411 U.S. at 802; *see also Bodenheimer*, 5 F.3d at 957 n.4. To establish a prima facie case of race discrimination under Title VII, a plaintiff must show the following elements: 1) membership in a protected class; 2) that the plaintiff was qualified for the position at issue; 3) that the defendant made an adverse employment decision despite the plaintiff's qualifications; and 4) that the plaintiff was replaced with a person not a member of the protected class. See *McDonnell Douglas*, 411 U.S. at 802. The prima facie case, if established, raises a presumption of discrimination that the defendant must rebut by articulating a legitimate, nondiscriminatory reason for the challenged employment action. See *Burdine*, 450 U.S. at 254-56; *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 992-93 (5th Cir. 1996) (en banc); *Bodenheimer*, 5 F.3d at 957. If the defendant satisfies this burden, the presumption disappears, and the plaintiff must prove that the proffered reason for the adverse employment action is a pretext for discrimination. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-09 (1993); *Meinecke v. H & R Block*, 66 F.3d 77, 83 (5th Cir. 1995); *Bodenheimer*, 5 F.3d at 957.

reviewing the verdict in a Title VII case after a trial on the merits "engage[s] in 'traditional sufficiency-of-the-evidence analysis' in determing whether reasonable jurors could find discriminatory treatment." *Travis*, 122 F.3d at 263 (quoting *Rhodes*, 75 F.3d at 993).

The verdict in favor of Wallace will survive Methodist's motion for judgment as a matter of law "if the evidence taken as a whole (1) creates a fact issue as to whether [Methodist's] stated reasons [were] what actually motivated [Methodist] and (2) creates a reasonable inference that [Wallace's pregnancies were] a determinative factor in [her termination]." *Scott*, 148 F.3d at 504 (quoting *Rhodes*, 75 F. 3d at 994).[12]

The question before this court is whether, based on the evidence presented at trial, taken as a whole, a reasonable jury could find that pregnancy discrimination was a determinative factor in Methodist's decision to terminate Wallace's employment on December 21, 1996.

III. Wallace's Assertions of "Direct" Evidence of Discrimination

Wallace argues that the record contains sufficient direct evidence to show that pregnancy discrimination was a motivating factor in Methodist's decision to terminate her employment.[13]

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[12] Wallace asserted claims both under Title VII and under the Texas Commission on Human Rights Act (TCHRA). "The law governing claims under the TCHRA and Title VII is identical." See *Shacketford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 n. 2 (5th Cir. 1999).

[13] Wallace also argues that Methodist has not preserved its right to move for JMOL post-verdict on the ground that the statements Wallace presented as direct evidence of discrimination were too temporally remote from her termination and too remote in subject matter to support a finding of liability. (Docket Entry No. 130, p. 4). While a party may not move for JMOL post-verdict on a ground that was not included in a JMOL motion at the close of the evidence, Wallace interprets the word "ground" too narrowly. Methodist need not have pointed out the reasons Wallace's evidence was not sufficiently probative, but merely needed to identify the issue which was not supported by sufficient evidence. Methodist's motion for JMOL at the close of the evidence clearly stated, "There is no evidence that the hospital considered the fact of [Wallace's] pregnancy" in deciding to discharge her. This courts finds that this statement was sufficient to preserve Methodist's right to move for JMOL post-verdict,

Direct evidence is defined in the Fifth Circuit as "evidence which, if believed, proves the fact [of intentional discrimination] without inference or presumption." *Portis v. First Nat'l Bank*, 34 F.3d 325, 328-29 (5th Cir. 1994) quoting *Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993)) (alteration in original). "In the context of Title VII, direct evidence includes any statement or written document showing discriminatory motive on its face." *Portis*, 34 F.3d at 329. The plaintiff must show that "the employer *actually relied on* [the forbidden factor] in making its decision." *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1218 (5th Cir. 1995) quoting *Langley v. Jackson State Univ.*, 14 F.3d 1070, 1075 (5th Cir. 1994) (alteration in original).

The term "direct evidence" was introduced to Title VII analysis in Justice O'Connor's concurrence in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In this case, Justice O'Connor concluded that the plaintiff had presented direct evidence of sex discrimination sufficient to "require the defendant to show that its decision [to place her on hold as to her partner status] would have been justified by wholly legitimate concerns." *Id.* at 273. The plaintiff presented evidence that "a number of the evaluations [of her] submitted by partners in the [accounting] firm overtly referred to her failure to conform to certain gender stereotypes as a factor militating against her election to the partnership" and that partner evaluations "were given 'great weight' by the decision makers at [the accounting firm]." *Id.* at 272. Additionally, "the partner responsible for informing Hopkins of the factors which caused her candidacy to be placed on hold, indicated that her 'professional' problems would be solved if she would 'walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry.'" *Id.* In the concurrence, Justice O'Connor describes several pieces of evidence that would not show that discrimination had formed a substantial factor in the employment decision, including "stray remarks in the workplace," statement by nondecisionmakers, and statements by decisionmakers unrelated to the decisional process. *Id.* at 277. In contrast to such evidence, Justice O'Connor placed "direct evidence that decisionmakers

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and to argue in that motion that Wallace's "direct evidence" was too remote in time and subject matter to support the jury's verdict.

placed substantial negative reliance on an illegitimate criterion in reaching their decision." *Id.*

In *Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir. 1999), the court engaged in a thorough and scholarly analysis of the varying definitions of "direct evidence" of employment discrimination. That analysis led the *Southland* court to conclude that in the Eleventh Circuit, courts quoted, but did not in fact apply, the "dictionary definition" of direct evidence. According to the dictionary definition, which the Fifth Circuit frequently quotes in Title VII cases, "direct" means "non-inferential" or "non-circumstantial." This definition seemingly limits "direct evidence" to evidence of a "remark that can only be interpreted as an admission of improper discrimination in the relevant employment decision." *Southland*, 187 F.3d at 1294.

In *Thomas v. National Football League Players Association*, 131 F.3d 198 (D.C. Cir. 1997), another case examining the meaning of "direct evidence," the court included the Fifth Circuit among several that limit the term to non-inferential or non-circumstantial evidence. The *Thomas* court rejected this limited approach, concluding that "the decision to shift the burden [under Price Waterhouse] properly rests upon the strength of the plaintiff's evidence of discrimination, not the contingent methods by which that evidence is adduced." *Id.* at 204. The Eleventh Circuit reached a similar conclusion in *Southland* after collecting the Title VII cases in that circuit involving "direct evidence." The Southland court concluded that the courts applied "direct evidence" more broadly than the dictionary definition they quoted would allow. The court settled on a "preponderance definition" as reflecting the courts' actual application of the term: "'direct evidence' [is] evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic." *Southland*, 187 F.3d at 1298. So defined, direct evidence includes any statement by the decisionmaker, reflecting a discriminatory attitude, that ties the discriminatory attitude to the relevant employment decision. *Id.* at 1294. Such evidence, not limited to non-inferential "direct" confessions of discrimination, is generally "sufficient evidence for a trier of fact to conclude more probably

than not that the employment decision was based on improper discrimination." *Id.*

A review of the cases suggest that the Fifth Circuit's own application of the term "direct evidence" is not as easily labeled as the D.C. Circuit suggested in *Thomas.* In *Brown v. East Mississippi Electric Power Association*, 989 F.2d 858 (5th Cir. 1993), the court characterized as "direct evidence" of discrimination the decisionmaker's frequent, routine use of racial slurs to refer to the plaintiff specifically and to persons in the protected class in general. The court held that the "routine use of racial slurs constitutes direct evidence that racial animus was a motivating factor in the contested disciplinary decisions." *Id.* at 860. However, the Fifth Circuit cases often quote the narrow "dictionary" definition to limit "direct evidence" to evidence that requires no inference or presumption to prove discrimination. *See, e.g., Sreeram v. Louisiana State Univ. Med. Ctr.*, 188 F.3d 314, 321 (5th Cir. 1999); *Nichols*, 81 F.3d at 958; *Portis*, 34 F.3d at 928-29.

The Fifth Circuit cases frequently involve evidence of remarks by a decisionmaker that are offered as "indirect" proof of discriminatory animus or motive. The Fifth Circuit cases analyze the probative value of such remarks as evidence of discrimination according to the extent to which the remarks satisfy the following criteria: the remarks (1) were related to the protected class of persons of which the plaintiff is a member; (2) were proximate in time to the employment decision at issue; (3) were made by an individual with authority over the employment decision at issue; and (4) were related to the employment decision at issue. See *Krystek v. University of S. Miss.*, 164 F.3d 251, 256 (5th Cir. 1999); *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655-66 (5th Cir. 1996).[14] Evidence of workplace remarks that does not amount to "direct" evidence may nonetheless have probative value in showing that discrimination motivated the challenged employment decision. However, a workplace remark may be so deficient under one or more of the listed criteria—for example, remote in time from the

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[14] If a workplace remark squarely meets all four criteria, it is the type of remark the *Southland* court identified as "direct" evidence of discrimination under the "preponderance definition." See *Southland*, 187 F.3d at 1294.

challenged action or not made by a relevant decisionmaker—as to be a stray remark wholly lacking in probative value even as "indirect" evidence of discrimination. See, e.g., *Krystek*, 164 F.3d at 256; *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 329-30 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1357 (1999); *Waggoner v. City of Garland*, 987 F.2d 1160, 1166 (5th Cir. 1993).

Against the backdrop of these cases, this court assesses what Wallace classifies as "direct" evidence of discrimination, to examine whether it was sufficient for a reasonable jury to find that pregnancy discrimination caused her discharge. Wallace identifies the following testimony in the trial record as direct evidence of discrimination, (Docket Entry No. 119, pp. 7-8):

1) Wallace testified that after she returned from her first maternity leave, Hahus treated her differently. "[Before Wallace's maternity leave, Hahus] made conversation [,] she greeted when we would pass in the morning [; after the leave,] she no longer did that." (Tr. 221).

2) Wallace testified that during her second annual evaluation, in late February or early March 1994, just before she began her second maternity leave, Schmitz said that she "did not know to categorize [Wallace] because [Wallace] was gone three months last year, and ... would be gone three months again this year." (Tr. 237).

3) Wallace testified that during this same evaluation, Hahus told her that she "needed to choose between nursing and family." (Tr. 227, 235-37).[15]

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[15] Hahus denied making this statement. (Tr. 1070). Hahus acknowledged that she and Schmitz had concerns about Wallaces's performance and addressed these concerns at the evaluation. Hahus testified that she told Wallace that Wallace "needed to make a commitment to the nursing profession," (Tr. 1071), and that Hahus "couldn't treat [Wallace] differently because she had a family." (Tr. 566).

4) Wallace testified that after she returned from her first maternity leave in June 1993, she worked a compressed time schedule that Methodist made available to its employees--three 12-hour shifts each week instead of five 8-hour shifts. In the summer of 1994, when she returned from her second maternity leave, Hahus told her that she was "costing the hospital money because [she] was receiving full benefits and not giving 80 hour pay periods." (Tr. 247). [16]

5) Wallace testified that on August 8, 1994, Hahus asked, "How stupid could you be?" after Wallace followed a doctor's written order without seeking clarification, when the order admittedly made no sense as written. (Tr. 249-250).

6) Pat Gaskin, a nurse in MICU, testified that in either late December 1994 or early January 1995, she overheard Shawn Forney, a clinical dietician at Methodist, ask Schmitz why Wallace had been fired. According to Gaskin, Schmitz responded, "First of all, she's been pregnant three times in the last three years." (Tr. 672).

Wallace's testimony that Hahus became "less friendly" after Wallace returned from her first maternity leave in June 1996 does not tend to show that Wallace's pregnancies were a motivating factor in Methodist's decision to terminate her in December 1994. Wallace did not dispute Methodist's evidence that nurses working under Hahus's supervision in the MICU frequently took maternity leave and returned to work without problem. Wallace argued that her situation was different because she was the only nurse pregnant three times in less than three years. Wallace

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[16] Hahus testified that the compressed time program "was a special program in 1994 as a result of the Clean Air Act that Methodist gave the opportunity for individuals to work three [12-hour shifts] in a week for a total of 72 hours in a pay period, instead of 80 hours, which had previously been mandated if you were in a full-time position....[A nurse on the compressed time program] received full benefits, but only the pay for the hours that [the nurse] worked." (Tr. 626).

did not dispute Methodist's evidence that Hahus accommodated Wallace's scheduling needs after her first and second pregnancies and helped her maximize her paid leave time during her second pregnancy. Wallace argued that her third pregnancy triggered Hahus's resentment. However, under this theory of the case, Wallace's testimony that Hahus displayed a discriminatory animus toward her as soon as Wallace returned from her first maternity leave is of marginal relevance. Even this relevance is undercut by Methodist's undisputed evidence that Hahus treated Wallace favorably in terms of scheduling and benefits even after the alleged change in demeanor, and did not discriminate against other pregnant nurses in the MICU.

Wallace's testimony as to Hahus's change in attitude was conclusory and subjective. It was not "direct" evidence under any definition and was not competent "indirect" evidence to support the jury's verdict. See *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir. 1994) (holding that plaintiff's "own self-serving generalized testimony stating her subjective belief that discrimination occurred" was not sufficient to support a jury verdict in her favor in an ADEA case); cf. also *Swanson v. General Servs. Admin.*, 110 F.3d 1180, 1186 (5th Cir. 1997) (stating that "a broad, generalized statement that black employees were 'watched' more closely that whites is incompetent to establish a pattern of [race] discrimination" under Title VII).

This court concludes that Wallace's generalized, subjective testimony about a change in Hahus's demeanor in June 1993 is not probative of discrimination.

Wallace had her second annual performance evaluation in late February or early March 1994, very shortly before she began her second maternity leave. In the performance evaluation, Hahus and Schmitz rated Wallace's performance as satisfactory but expressed some concerns. Wallace points to two comments made during the performance evaluation as direct evidence of discriminatory animus based on her pregnancies: Schmitz's statement that "she didn't know how to categorize [Wallace] because [Wallace] was gone three months last year, and ... would be gone three months again this year, " and Hahus's statement that Wallace needed to choose between nursing and family.

Schmitz testified that it was "possible" that she made the statement about classifying Wallace. Schmitz explained the statement as follows:

> On the performance appraisal at the time—actually, there was an additional part of the evaluation that was a method of awarding points toward promotion. And so, the performance appraisal counted for part of that, but there were other factors that were figured in towards promotion.
>
> One of the factors was experience, and there was a cutoff between two years of experience and less than two years. And Veronica had started two years before, but had some absences. And I just was thinking, well, I'm not sure since leave of absence is not counted toward benefit accumulation that I wasn't sure how to count it in this specific thing. It turns out she got credit for the two years, and it wasn't a factor. But that's the only thing that I can think of that that comment would refer to.

(Tr. 1003). Schmitz's statement did not refer expressly to Wallace's pregnancies, but to the absences resulting from her pregnancies.[17] Schmitz did not express a discriminatory attitude towards Wallace's pregnancies. Schmitz did not make the decision to terminate Wallace. The statement at issue was made ten months before the termination. The statement is not direct or "indirect"

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[17] The Seventh Circuit has noted that Title VII, as amended by the PDA, "requires the employer to ignore an employee's pregnancy, but ... not her absence from work, unless the employer overlooks the comparable absences of non-pregnant employees." *Marshall v. American Hosp. Ass'n*, 157 F.3d 520, 526 (7th Cir. 1998) (quoting *Troupe v. May Dep't Stores Co.*, 20 F.3d 734. 738 (7th Cir. 1994)) (alternation in original); see also *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204 (5th Cir. 1998).

evidence of pregnancy discrimination; it is not probative of discriminatory animus.

Wallace testified that during the same performance appraisal meeting, Hahus told her that she "needed to choose between work and family." (Tr. 227, 235-37). This statement differs from those discussed above. Although Hahus's statement does not refer explicitly to Wallace's pregnancies, it can be interpreted to show discriminatory animus because "it invoked [a] widely understood stereotype []." *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1045 (7th Cir. 1999). The statement suggested that Hahus, the principal decisionmaker in Wallace's termination, believed that Wallace's family commitments were impairing her work performance. See *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 656-657 (5th Cir. 1996). However, Hahus made this remark nearly ten months before Wallace's termination. It is undisputed that in this performance evaluation, Hahus rated Wallaces's work as satisfactory and Wallace received a raise. It is also undisputed that after this remark, Hahus helped Wallace maximize the amount of paid time she would receive during her second maternity leave. The record does not disclose a connection between Hahus's statement in the performance evaluation and her later decision to terminate Wallace. The statement may be "indirect" evidence, but is not "direct" evidence of discrimination.

The comment Hahus made on August 8, 1994, cannot be considered evidence of discrimination based on pregnancy. On that day, Wallace, following a doctor's written order, drew blood from a patient to test the digoxin level. The patient had been given digoxin within six hours of the blood draw, which would cause falsely high readings in the digoxin test. Wallace acknowledged that although the doctor's order was questionable on its face, she did not seek clarification before carrying it out. Wallace testified at trial that Hahus, after learning of this incident, asked Wallace, "How stupid could you be?" (Tr. 249). Wallace claimed that this remark was direct evidence of discriminatory animus based on pregnancy.

This remark did not directly or indirectly refer to Wallace's pregnancies or to pregnancy in general. The record discloses no connection between the statement and Wallace's pregnancies. The remark was made four months before Wallace

was discharged. No record evidence suggests that this incident or Hahus's remark about it had anything to do with her decision to discharge Wallace. In the absence of any evidence of a causal connection to Wallace's termination or any relationship to Wallace's pregnancies, Hahus's statement is neither direct nor indirect evidence of discrimination. See *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655-56 (5th Cir. 1996).

Wallace presented testimony by a hospital employee, Pat Gaskin, that she had overheard a conversation between Schmitz and another employee, Shawn Forney, as direct evidence that Hahus decided to discharge Wallace out of resentment of Wallace's repeated pregnancies. Gaskin testified as follows:

> Q. Did you hear Ms. Schmitz make a comment about Ms. Wallace as to why she was terminated?
> A. Yes.
> Q. What did you hear?
> A. I heard someone ask why she was fired; and she said, first of all, she's been pregnant three times in the last three years.
> Q. And the someone that you heard ask that, was that Ms. Shawn Forney?
> A. Yes
> .....
> Q. ...What did Ms. Schmitz respond?
> A. She said, "First of all, she's been pregnant three times in the last three years."
> Q. And did you hear any more of the conversation?
> A. No.
> Q. What did you do at that point?
> A. I walked away.

(Tr. 671-72)[18]

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[18] Under cross-examination, Gaskin testified that she heard only a small part of the conversation:

> Q: And when Ms. Schmitz made the statement ["pregnant three times in three years"], your recollection is that you just walked away; is that correct?

This court is obligated to "view all of the evidence in the light most favorable to the verdict." *Baltazor*, 162 F.3d at 373. This court does note that both Forney and Schmitz, the actual participants in the conversation, remember this conversation quite differently. Schmitz testified that Forney had asked her which nurse had been terminated. (Tr. 1006). Schmitz told her it was Veronica Wallace, but Forney "did not seem to recognize [the name]." (Tr. 1007). Schmitz testified: "I gave [Forney] a physical description: dark hair, big smile. And [Forney] still didn't appear to recognize who that was. And in order to further define that person, I said, 'And she's been pregnant three times in the past three years.'" (*Id.*). At that point, Schmitz claims, Forney recognized who Wallace was and the discussion ended.

Forney also testified at trial. Forney agreed that Schmitz was merely providing "a physical description of Veronica [Wallace]." (Tr. 933). Forney testified that she was "a hundred percent" certain that Schmitz was not conveying to her the reason

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A: Yeah. Because I was kind of surprised to hear that.
Q: But you didn't stay to hear the rest of the conversation.
A. No, I didn't stay.
Q: And you hadn't been listening to the first part of the conversation either?
A. That was all I really heard. I don't know if that was the first part or not.
Q. So that statement was all you really distinctly recall hearing?
A. Yeah. [Forney] asking the question, and [Schmitz] giving the answer.
Q. Did you hear what the context of what Ms. Forney's question was? Do you know what they were talking about?
A. Not by- I just assumed they were talking about Veronica.

(Tr. 687-88).

for Wallace's termination (*Id.*). Forney stated that if Schmitz had told her that Wallace had been fired because of her pregnancy, she "would have been appalled." (*Id.* at 934). "I would have been talking to everybody about that. I would have been furious. As a woman myself, that is so discriminatory." (*Id.*).

For the purpose of this motion, this court accepts Gaskin's account of the portion of the conversation she overhead. However, Gaskin gave no testimony to establish the basis for, or context of, Schmitz's statement, and Wallace did not otherwise present evidence on these points.

The record discloses that Hahus, not Schmitz, made the decision to discharge Wallace. Schmitz was Wallace's direct supervisor and participated in annual performance evaluation, but the undisputed testimony was that, as Wallace herself pointed out, Wallaces's overall performance was "not considered in Ms. Wallace's termination." (Docket Entry No. 119, p. 7). Schmitz called Wallace on December 20, 1994, at Hahus's direction, to ask Wallace about the December 19, 1994 incident and reported to Hahus what Wallace said. (Tr. 1018, 1021). Schmitz testified without contradiction that she had no further role in the events that led to Wallace's discharge and did not participate in that decision. (Tr. 1021).

Gaskin did not testify that Schmitz told Forney that Hahus had told Schmitz that Wallace's repeated pregnancies were a factor in her termination. Schmitz did not repeat a statement Hahus had made to her, revealing Hahus's reasons for the decision. Gaskin's testimony of the conversation she overheard between Schmitz and Forney described Schmitz's opinion of one reason for Wallace's termination. Gaskin's testimony was not direct evidence of Hahus's discrimination.

The Fifth Circuit's decision in *Haas v. ADVO Systems, Inc.*, 168 F.3d 732 (5th Cir. 1999), is instructive. In *Haas*, the employer's vice-president told the plaintiff, a 54-year-old job applicant, after an interview, that "his only concern about hiring [the applicant] was [the applicant's] age." *Id.* at 733. The vice-president recommended that the company not hire the plaintiff. However, the company president actually made the decision not to hire the plaintiff. The Fifth Circuit held that, in the absence of any clear indication that the employer "actually relied on" the

applicant's age in making its decision, the vice-president's statement was not direct evidence of discrimination.

Schmitz's statement differs from the remark at issue in *Haas* because Schmitz's remark was made after the challenged decision and purported to relate the reasons for the decision. The discriminatory statement in *Haas* was more strongly probative of discrimination—it was made before the challenged decision by an employee who offered a recommendation about the decision and raised questions about whether the employer relied on a forbidden factor. However, the statements are similar to the extent that both were made by a person who was not the principal decisionmaker and the record in both cases failed to show the nature of the connection, if any, between the statement and the challenged decision. Schmitz's statement is substantially less probative of discrimination than the statement in *Haas* rejected as direct evidence. Gaskin's testimony about Schmitz's statement is insufficient, alone or in conjunction with Hahus's statement that Wallace "needed to choose between work and family," to constitute direct evidence showing that pregnancy discrimination was a motivating factor in Methodist's termination of Wallace. Both statements may be "indirect evidence," and will be considered in this court's assessment of the sufficiency of Wallace's evidence showing that Methodist's asserted nondiscriminatory reasons for discharging her were a pretext for pregnancy discrimination.

IV. The Evidence of Pretext and Discriminatory Motive

Wallace did not dispute that she wrote the verbal order in Mr. B's chart that provided for the removal of the Salem sump and insertion of a feeding tube, before she had obtained such an order. She admitted that she did the procedure without a doctor's order. She presented two kinds of evidence to show that Methodist used her conduct as a pretext for pregnancy discrimination. First, she argued disparate discipline: her conduct did not violate hospital practice because other nurses outside her protected class had written verbal orders for, and performed, similar procedures without obtaining doctor's orders in advance and without adverse employment consequences. Second, she pointed to the allegedly discriminatory statements made by Schmitz and Hahus,

particularly Hahus's statement that Wallace "needed to choose between work and family" and Schmitz's statement to Forney that Wallace's three pregnancies in three years were the primary reason for her discharge.

This court must consider all the record evidence to determine if there is a fact issue about whether Methodist's asserted reasons for discharging Wallace were merely a pretext for pregnancy discrimination. A "mere scintilla" of evidence of pretext will not preclude a JMOL in Methodist's favor. 'Even if the evidence is more than a scintilla, '...some evidence may exist to support a position which is yet so overwhelmed by contrary proof as to yield to a [JMOL]." *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (quoting *Neely v. Delta Brick & Tile Co.*, 817 F.2d 1224, 1226 (5th Cir. 1987)). The analysis requires a comparison of Methodist's evidence of legitimate, nondiscriminatory reasons for Wallace's discharge with Wallace's evidence of pretext in order to determine whether there is "conflict in substantial evidence." *Id.*

Methodist's stated reason for discharging Wallace was her violation of hospital policies by falsifying a medical record and by performing a procedure without a doctor's order. The evidence is undisputed that Wallace falsified a patient's chart by writing a doctor's order that had not been given. (Tr. 388, 406). The evidence is also undisputed that she performed a procedure that, under Methodist's official policies, she was prohibited from doing without an order from a physician. (Tr. 388, 408-09).

Methodist policy clearly stated that "[a] physician order is required for the insertion or removal of a nasogastric tube." (D. Ex. 4, Policy No. D-707, Revision No. 3, p. 1). Methodist treated Wallace's conduct as a Class I violation under Methodist's Due Process disciplinary policy, defined as a "serious violation of System standards under circumstances that, after thorough consideration of the facts, may justify termination for a first violation without regard to the employee' length of service or prior record of conduct." (D. Ex. 4, Official Procedure No. P001, Revision No. 5 p.2). Among the examples of Class I violations listed in Methodist's policies are "illegal, unprofessional, or unethical conduct detrimental to patient care or to [Methodist's] operations" and "falsifying information to management regarding

...[job] performance." (D. Ex. 4, Official Procedure P001, Appendix A, p. 1). Methodist classified Wallace's conduct under both these descriptions in finding a Class I violation that justified her termination. Wallace argued pretext: other nurses engaged in similar conduct, but were not discharged.

To prevail in a discriminatory discharge case involving an alleged violation of a "work rule," a plaintiff must show either that the employer did not reasonably believe the plaintiff violated the rule or that, if the plaintiff did violate the rule, other employees not in the plaintiff's protected class engaged in similar acts without suffering similar consequences. See *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090-92 (5th Cir. 1995); see also *Simmons v. Rothe Dev., Inc.*, 952 F. Supp. 486, 490 (S.D. Tex.), *aff'd*, 132 F.3d 1456 (5th Cir. 1997). To establish disparate discipline, the employee must show that other employees outside the protected class were treated more favorably "under 'nearly identical' circumstances." *Little v. Republic Refining Co.*, 924 F.2d 93, 96-97 (5th Cir. 1991) (quoting *Smith v. Wal-Mart Stores*, 891-F.2d 1177, 1180 (5th Cir. 1990)); see also *Mayberry*, 55 F.3d at 1090.

Wallace argued that Methodist permitted nurses to perform a variety of procedures without obtaining a doctor's order in advance. However, a careful review of the undisputed testimony is that the procedures Wallace and other witnesses described different from, and did not include, the removal of a Salem sump and insertion of a small bore feeding tube.

Wallace testified that she had inserted an IV line without receiving a doctor's order. (Tr. 293). However, Hahus testified, without contradiction, that no policy required a physician's order for the insertion of an IV line. (Tr. 644-45). Wallace testified that she had seen other nurses write a verbal order for and perform the following procedures without receiving a doctor's order: concentrating medication to maintain blood pressure level, (Tr. 293-94); concentrating medication to comply with standing order for fluid restrictions, (Tr. 294, 427-30); drawing blood for lab work, (Tr. 296); and renewing restraints. (Tr. 296-97). Hahus testified, without contradiction, that no Methodist policy required a physician's order for any of these procedures. (Tr. 640-45).[19]

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[19] As to the example of renewing restraints, Hahus testified that Methodist policy permitted nurses to renew restraints as long as the nurse

Wallace produced no evidence that Methodist policies required a physician's order for any of these procedures.[20] By contrast, written Methodist policy did require a physician's order for the insertion of a nasogastic tube in a nonemergency situation.[21]

Wallace's argument that her action was consistent with nursing practices at Methodist MICU and did not violate any work rule was also flatly contradicted by the testimony of other Methodist nurses at trial. Five nurses were asked whether, in their experience they had replaced a Salem sump with a small bore feeding tube without receiving a doctor's order to do so. Each answered that she had not. The same five nurses were asked how they responded upon receiving an order to begin tube feeding a patient who already had a Salem sump in place. Each testified that she had administered the feeding through the Salem sump. During

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obtained a doctor's authorizing signature within 24 hours of renewal. (Tr. 640, 645-46).

[20] Nurse Pat Gaskin testified that she had seen Schmitz writing orders to restock the MICU medication inventory. (Tr. 669). However, Wallace produced no evidence that a written Methodist policy required a doctor's order in this situation. Methodist policy did require a physician's order for the "administration of medications" and for "medications intended for self administration." (D. Ex. 4, Policy No. D-201, p.1). Gaskin did not testify that Schmitz wrote orders to administer medications; she testified that Schmitz wrote orders to restock inventory.

[21] Wallace argued that Methodist failed to preserve its right to move for JMOL post-verdict on the ground that Wallace's evidence of disparate discipline did not involve nurses who falsified a verbal order for and performed procedures that, by hospital policy, required a doctor's order. (Docket Entry No. 130, p. 6). Wallace interprets the word "ground" too narrowly. Methodist, in its motion for JMOL at the close of evidence, stated that "plaintiff ha[d] presented no evidence that any managerial or supervisory personnel with the authority to hire, fire, discharge and supervise, were aware of any specific instances where verbal orders or procedures requiring a doctor's preapproval were ever written and undertaken without attempting to contact the physician, or—and writing the falsification into the record." (Tr. 1097). Methodist also stated that "plaintiff [had] not met its burden of demonstrating that nonpregnant nurses wrote verbal orders for the types of procedures that she was terminated for and absent termination." (*Id.*). These statements were sufficient to preserve Methodist's argument about Wallace's disparate discipline evidence for a post-verdict motion for JMOL.

cross-examination by Methodist's counsel, nurse Amy Goggins testified as follows:

Q. Have you ever removed a Salem sump from a patient and switched it out for a small bore feeding tube?
A. Yes.
Q. And were-did you discuss it or at least attempt to talk with a doctor before you did that?
A. Yes. Usually you have an order to do that.
Q. So you would have the order to do that?
A. Yes.
Q. Okay. Have you ever received an order to begin tube feeding?
A. Yes.
Q. If the patient had a Salem sump, would you switch out the tube?
A. Not necessarily.
Q. You would leave the Salem sump in place?

....

A. Yes, I would, if there was nothing, you know, if no adverse effects would happen to the patient.
Q. Would it be fair to say, Ms. Goggins, that it's not very difficult to find a doctor in MICU?
A. No, it's not hard to find a doctor.

....

Q. If you have any questions about a particular order, what do you do?
A. I get clarification from a doctor.

(Tr. 591-93). Nurses pat Gaskin, Valerie Hooper, and Linda Coscio gave similar testimony. (Tr. 675-79, 682 (Gaskin); Tr. 602-04 (Hooper); Tr. 971-72 (Coscio)).[22]

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[22] Wallace's own testimony revealed that her decision to replace the Salem sump with a small bore feeding tube was based on incomplete and inaccurate understanding of how the devices worked inside the patient. Wallace testified that she based her decision on what she had learned in nursing school, that the Salem sump was placed where it would deliver the food to the stomach area, while the small bore feeding tube would place the feeding directly in the intestine and bypass the stomach. Wallace concluded that a small bore feeding tube was better for Mr. B, who had "gut atrophy" and who might aspirate a feeding delivered to the stomach. (Tr. 347-53). Dr. Lloyd testified that in fact, both the small

Wallace testified that she had seen one nurse, Linda Coscio, write a verbal order to insert a Foley catheter and insert the catheter without having received a doctor's order. (Tr. 292). Wallace admitted that she could not definitively state that Coscio had not received a doctor's order before Wallace began observing her. (Tr. 424-25). Wallace admitted that she did not review the chart to see if a doctor signed the order Coscio wrote. (Tr. 425). Coscio herself denied that she had ever inserted a Foley catheter without first receiving a doctor's order. (Tr. 970-71). Hahus testified that a doctor's order was indeed required for the insertion of a Foley catheter. Hahus also testified that she had never been told, and did not know, of any incident in which a nurse wrote an order for and inserted a Foley catheter without a doctor's order. (Tr. 646-47). Wallace produced no evidence that any nurse supervisors knew of the infraction she alleged and failed to take disciplinary action.

Wallace also testified that she had seen a nurse write a verbal order for, and give, a breathing treatment in an emergency situation, without a doctor's order. (Tr. 295). In her testimony, Hahus indicated that a nurse needed to talk to a doctor before writing an order and performing a procedure only in a nonemergency situation. (Tr. 640). Hahus also testified that she did not know of the incident Wallace described in her testimony. (Tr. 643). Wallace presented no evidence that any nurse supervisor knew about that incident and failed to take disciplinary action.

Several nurses testified that they had written verbal orders for x-rays and had those x-rays taken without a doctor's order. (Tr. 528-29, 586-87). The nurses testified that a doctor might order a procedure that required an x-ray follow-up by policy, but would not expressly order the x-ray. In such cases, the nurses testified that they wrote verbal orders for an x-ray. Hahus admitted that she knew nurses sometimes wrote verbal orders for x-rays without speaking to a physician. (Tr. 648). Consistent with the nurses' testimony, Hahus said that nurses did this to verify placement of a endotracheal tube or central line, when those procedures had previously been ordered by a physician. (Tr. 648-49). This

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bore feeding tube and the Salem sump deliver the feeding to the stomach. (Tr. 735-37).

practice cannot support Wallace's claim that she did not falsify Mr. B's chart; the verbal order she recorded was not for a procedure that was required by policy as a follow-up to another procedure that had been ordered by a physician. Moreover, Wallace produced no evidence of a written Methodist policy that required a physician's order for all x-rays.[23]

Hahus testified, without contradiction, that a "verbal order," an order given orally by a physician either personally or over the telephone, can be of two general types in nonemergency situations. The first is a verbal order for a medical procedure that requires a physician's order in advance. A doctor must order the procedure before the nurse may record a verbal order and perform the procedure. Although the doctor may sign the order after the fact, the doctor must give the order before it is charted and performed. The second type of verbal order is an order for those aspects of care that do not require a doctor's authorization in advance. Such orders, covering such items as over-the-counter drugs or items like Chapstick, do not require a doctor's order before the medication is provided or the work performed. However, a doctor will typically sign such a verbal order after the fact for insurance or billing purposes. In such a case, the nurse may record a verbal order and provide the non prescription medication and care, and later receive the doctor's after-the-fact acknowledgement. The second type of verbal order does not apply to procedures that, by Methodist's written policy, require a doctor's order in advance. (Tr. 638-41).

Wallace emphasized one incident in particular as supporting her disparate discipline claim. Cheryl Gray worked as a contract nurse in the MICU in approximately 1994. Gray had a patient in the MICU for whom a doctor had ordered Tylenol, to be given rectally. The patient could not accept the medicine rectally.

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[23] The only policy entered in the trial record that required a physician's order for an x-ray dealt with the use of a weighted bolus feeding tube and stated: "A physician's order for x-ray verification of tube placement must be obtained when the position of the [weighted bolus] feeding tube cannot be determined by clinical examination." (D. Ex. 4, Policy No. D-711, p.1). No nurse testified that she wrote a verbal order for an x-ray to verify placement of a weighted bolus feeding tube without receiving a doctor's order.

Gray asked a resident if she could administer the drug by mouth. The resident agreed, but the Tylenol could not be given by mouth because the patient was on a respirator. (Tr. 524). Gray then placed a nasogastric tube in the patient and administered the Tylenol through it. Upon discovering that the tube had been placed, the patient's attending Physician asked who had ordered and placed the tube. Gray said she had placed the tube. (Tr. 525). The next day, Hahus and Schmitz each verbally reprimanded Gray about the incident, but she was not terminated or formally disciplined. (Tr. 525).

This incident does not evidence disparate discipline, as Wallace contends.[24] Gray's conduct was not "nearly identical" to Wallace's conduct. While Gray inserted a feeding tube without a doctor's order as Wallace did, there is no evidence that Gray also falsified the patient's chart by purporting to record a doctor's verbal order for the procedure. Only Wallace both inserted a tube without a doctor's order and recorded a false verbal order for the procedure. Methodist policy includes falsification of records as an example of a Class I violation that may justify termination. The fact that Gray was not terminated does not show disparate discipline.

Methodist did present undisputed evidence that a nurse who was discovered to have made a false entry in a patient chart was disciplined. (Tr. 607-08). Wallace presented no evidence that Methodist had failed to discharge a nonpregnant nurse who had written an entry in a patient's chart to show that a doctor had given an order for a procedure that required a doctor's order, and performed the procedure, without obtaining the order.[25] In short, there was not "nearly identical" nurse or situation presented in the evidence to support Wallace's disparate discipline argument.

Wallace's evidence of pretext, including Hahus's March 1994 statement and Schmitz's statement to Shawn Forney shortly

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[24] The doctor's questioning of Gray's action, like Dr. Lloyd's questioning of Wallace's action, tends to support Methodist's position that its policy forbids a nurse to make the decision to insert a nasagastric tube without a doctor's order, obtained before the procedure.

[25] Nurse Amy Goggins testified that she had inserted a Foley catheter without a doctor's order. However, she could not "recall writing a verbal order saying to insert one." (Tr. 587).

after Wallace was discharged are insufficient, in light of Methodist's considerable and largely undisputed evidence of Wallace's violation of written workplace policies, to show Methodist's asserted reasons for Wallace's termination were a pretext for pregnancy discrimination and to preclude judgment as a matter of law.

It is instructive to distinguish this case from two similar cases in which the Fifth Circuit decided that a Title VII defendant was not entitled to judgment as a matter of law. In *Woodhouse v. Magnolia Hospital*, 92 F.3d 248 (5th Cir. 1996), the plaintiff, a 53-year-old nurse, won a jury verdict in an age discrimination case. The employer presented evidence that the plaintiff's position was eliminated as part of a valid reduction in force ("RIF"). The plaintiff presented evidence that called into question the validity of the asserted reasons for the RIF. More importantly, the employer presented no evidence of legitimate, nondiscriminatory reasons for choosing the plaintiff's position for elimination in the RIF. The plaintiff presented evidence that the employer's chairman of the board told another employee that the employer "was planning lay off the 'older employees'" in the upcoming RIF. *Id.* at 253. In a later conversation, the same employee reminded the chairman that he had "said... [that] [t]hey're gonna lay off those old people." The chairman responded, "That's what they told me." *Id.* The plaintiff relied on the evidence of the chairman's statements to show age discrimination. The employer responded by pointing out that the chairman was not involved in deciding which positions would be eliminated, as the board had delegated that responsibility to the administrative staff. The court held that the chairman's statement was probative of age discrimination, finding that "'[t]he jury could infer that [the] 'they' [in the chairman's statement] referred to the administrative staff, "which was accountable to the Board and to whom the Board had delegated responsibility for determining the positions to be eliminated, given that all evidence indicated that they were the persons directly involved in the elimination decision." *Id.* at 254-55. The plaintiff also presented evidence that the employer did not follow its stated policy of consulting the appropriate department head before deciding to eliminate her position and presented evidence disproving the employer's stated reason for later refusing to rehire the plaintiff.

The Fifth Circuit upheld the district court's denial of the defendant's motion for judgment as a matter of law, finding that the plaintiff had "presented much more than a scintilla of evidence to support her age discrimination claim." *Id.* at 256.

Methodist's evidence of legitimate reasons for its action is much stronger than the employer's evidence was in *Woodhouse*, and Wallace's evidence is much weaker than the plaintiff's evidence in that case. Methodist presented undisputed evidence that Wallace violated written hospital policy. In *Woodhouse*, the plaintiff presented evidence that cast doubt on the validity of the employer's evidence that it undertook the RIF for valid reasons, and the employer produced no evidence that is used legitimate criteria in deciding which positions to eliminate in the RIF. The plaintiff in *Woodhouse* also presented evidence that the chairman of the board, although not the relevant decisionmaker, said that "they" had told him that older employees would be terminated as a result of the RIF. Although the "they" was not identified, the court held that the jury could infer that it referred to the principal decisionmakers. In this case, Wallace presented evidence that Schmitz, who was not the relevant decisionmaker, said Wallace had been discharged because of her pregnancies. Schmitz, unlike the chairman in *Woodhouse*, did not say that anyone had told her this; specifically, there was no suggestion that Hahus, the relevant decisionmaker, had told her. This statement was substantially less probative than the chairman's statement in *Woodhouse*. The plaintiff in *Woodhouse* offered other strongly probative evidence, besides the chairman's statement, that showed pretext. Wallace presents no similarly probative evidence of discrimination. The strongest evidence is Hahus's statement that Wallace needed to choose between work and family, a statement made ten months before Wallace was terminated and with no demonstrated connection to the termination decision.

The other similar, but distinguishable, case is *Haas v. ADVO Systems, Inc.*, 168 F.3d 732 (5th Cir. 1999). In that case, the plaintiff alleged age discrimination, presenting evidence that a vice-president of the employer said, after interviewing the plaintiff, that his "only concerns about hiring [the plaintiff] were [his] age." *Id.* at 733. The vice-president did not make the final decision not to hire the plaintiff, but did make a recommendation. The

employer asserted, as its legitimate nondiscriminatory reason for denying the plaintiff a position, that the vice-president "felt the chemistry was better with [another candidate]." *Id.* The Fifth Circuit reversed the district court's grant of summary judgment, holding that the evidence of the vice-president's statement, although not "direct evidence" of discrimination, was sufficient to defeat summary judgment. See *Id.* at 734.

Again, compared to Haas, Methodist's evidence is stronger than the employer's evidence, and Wallace's evidence is weaker than the plaintiff's. Methodist offered specific evidence that Wallace violated workplace policy; the employer in Haas merely said that the same vice-president who made a remark showing discriminatory animus felt that the "chemistry" was better with a different job candidate. The employer in *Haas* conceded that the vice-president who made the discriminatory remark offered a recommendation about the position. By contrast, Schmitz, although she offered some factual information to Hahus, did not participate in the decision to terminate Wallace, and Hahus's own arguably discriminatory statement was remote from the termination decision.

In this case, unlike *Woodhouse* and *Haas*, the plaintiff's "indirect" evidence that the employer's asserted reasons were a pretext for discrimination is insufficient to preclude judgment as a matter of law. When Wallace's evidence is placed next to Methodist's evidence, it is "so overwhelmed by contrary proof as to yield to a [judgment as a matter of law]." *Rhodes*, 75 F.3d at 993.

V. Conclusion

The record as a whole does not present sufficient evidence to support the jury's findings of discrimination. Wallace admitted performing a procedure without a doctor's authorization after making an entry in the patient's chart showing that such authorization had been given. Under Methodist's written policies, such violation was a ground for discharge, even of a long-term employee. Other than the discharge, Wallace alleged no discrimination in the terms and conditions of her employment. She received good evaluations, the hours and shifts she requested, scheduled raises, and the benefits available, including the

maximum paid maternity leave that Hahus could obtain on Wallace's behalf. It was not until Wallace violated Methodist policies that she lost her job. The evidence that this occurred just as Wallace was about to begin maternity leave; that Wallace believed Hahus resented her repeated pregnancies; and that Hahus and Schmitz made isolated remarks that may suggest discrimination, is simply insufficient, on this record, to sustain the jury's verdict. Methodist's motion for judgment as a matter of law is GRANTED.

SIGNED on February 24, 2000, at Houston, Texas.

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Lee H. Rosenthal
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA WALLACE,	§	
	§	
Plaintiff,	§	
	§	CA NO. H-97-0095
	§	
THE METHODIST HOSPITAL	§	
SYSTEM,	§	
	§	
Defendant.	§	

FINAL JUDGMENT

In accordance with the court's Order of even date, this action is DISMISSED with PREJUDICE. Each party is to bear its own costs.

This is a Final Judgment.

SIGNED on February 24, 2000, at Houston, Texas.

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Lee H. Rosenthal
United States District Judge